IN THE SUPREME COURT OF THE STATE OF ALASKA

KEVIN MEYER, LIEUTENANT GOVERNOR OF THE STATE OF ALASKA and the STATE OF ALASKA, DIVISION OF ELECTIONS, Appellants, v. VOTE YES FOR ALASKA'S FAIR SHARE, Appellee.	)	Supreme Court No. **S-17818**

Trial Court Case No. **3AN-19-11106 CI**

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
HONORABLE WILLIAM F. MORSE

APPELLANTS KEVIN MEYER, LIEUTENANT GOVERNOR OF THE STATE OF ALASKA AND THE STATE OF ALASKA, DIVISION OF ELECTIONS EXCERPT OF RECORD VOLUME I OF I

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

VOTE YES FOR ALASKA'S FAIR SHARE, Plaintiff, v. KEVIN MEYER, LIEUTENANT GOVERNOR OF THE STATE OF ALASKA, and STATE OF ALASKA, DIVISION OF ELECTIONS, Defendants.	Case No. 3AN-19-11106 CI

COMPLAINT

Vote Yes for Alaska's Fair Share ("Fair Share"), an Alaska-based nonprofit organization, by and through counsel, Brena, Bell & Walker, P.C., for its complaint against Lieutenant Governor Kevin Meyer ("Meyer") and the State of Alaska, Division of Elections ("Division"), complains and alleges as follows:

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INTRODUCTION

The right to propose and enact laws through initiative is a constitutional right of all Alaskans that should not be compromised by Defendant Meyer or any other state official in the conduct of their official duties necessary to advance an initiative to the ballot. Defendant Meyer's or any other state official's disagreement with a proposed law through initiative should not be permitted to shape the conduct of their official duties.

In this case, Defendant Meyer certified the proposed law, the Fair Share Act, as meeting all of the constitutional and statutory requirements necessary to advance to the ballot. In doing so, Defendant Meyer's certification was based, in part, on the opinion of the Attorney General that stated, "we conclude that the application complies with the constitutional and statutory provisions governing the initiative process."

While Defendant Meyers and the Attorney General agreed that the Fair Share Act met all the constitutional and statutory requirements to advance to the ballot, they did so to be charitable reluctantly. The Attorney General's opinion goes beyond assisting Defendant Meyer in determining whether the Fair Share Act meets the constitutional and statutory requirements to advance to the ballot. Instead, with often contradictory and confused analyses, the Attorney General's opinion raises and then refuses to opine on several potential, future constitutional and legal issues unrelated to whether the Fair Share Act meets the constitutional and statutory requirements to advance to the ballot. It does so notwithstanding its observation that the Alaska Supreme Court "refrain[s] from giving pre-enactment opinions on the constitutionality of

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statutes whether proposed by the legislature or by the people through their initiative power, since an opinion on a law not yet enacted is necessarily advisory."

After Defendant Meyer certified the Fair Share Act as meeting all of the constitutional and statutory requirements to advance to the ballot, his primary remaining duty was to prepare a ballot title and proposition. AS 15.45.180. The proposition is required by law to "give a true and impartial summary" of the Fair Share Act.

This case concerns whether Defendant Meyer met his duty to prepare "a true and impartial summary" of the Fair Share Act ("Summary"). He did not. Instead, Defendant Meyer's and the Attorney General's reluctant certification found clear expression in the confused and contradictory Summary they have advanced. The essential purpose of the Summary is to be a true and impartial description of the Fair Share Act, but the Summary advanced by Defendant Meyer is neither. These actions by Defendant Meyer undercut the initiative rights of Alaskans and should not be countenanced by the courts. The Summary should be corrected to ensure Fair Share's constitutional and statutory rights associated with the initiative process are not compromised by Defendant Meyer, and the Fair Share Act is truly and impartially described on the ballot for voters.

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Fair Share is a nonprofit organization of Alaskans across the political spectrum who seek to ensure that Alaska receives its fair share of the revenues generated by its oil resources. Fair Share is organized under the laws of the State of Alaska and is in all ways

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qualified to maintain this action. Fair Share's petition sponsors are Robin O. Brena, Jane R. Angvik, and R. Merrick Pierce.

2. Defendant Meyer is being sued in his official capacity as Lieutenant Governor of the State of Alaska.

3. Defendant Division is an agency of the State of Alaska within the Office of the Lieutenant Governor.

4. This Court has jurisdiction over this dispute under AS 22.10.020 and AS 15.45.240.

5. Alaska Statute 15.45.240 provides that "[a]ny person aggrieved by a determination made by the lieutenant governor under AS 15.45.010--15.45.220 may bring an action in the superior court to have the determination reviewed within 30 days of the date on which notice of the determination was given."

6. Fair Share is an aggrieved person under AS 15.45.240 and may bring suit under Alaska Rule of Civil Procedure 17(b).

7. Defendant Meyer's determination was sent to the sponsors on October 15, 2019. This Complaint is brought within the required 30 days.

8. Venue is proper under Alaska Rule of Civil Procedure 3(c)(2) because Defendants may be personally served in the Third Judicial District, and Fair Share is based in Anchorage.

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FACTUAL ALLEGATIONS

9. Fair Share filed its petition application on August 16, 2019. The petition was designated "An Act relating to the oil and gas production tax, tax payments, and tax credits" ("Fair Share Act") with ID 19OGTX. Under AS 15.45.070, Defendant Meyer was required to either certify or deny the application within 60 days.

10. Under AS 15.45.080, Defendant Meyer could deny certification only if he determined that "(1) the proposed bill to be initiated is not confined to one subject or is otherwise not in the required form; (2) the application is not substantially in the required form; or (3) there is an insufficient number of qualified sponsors."

11. Defendant Meyer certified the application on October 15, 2019. Under AS 15.45.180(a), Defendant Meyer was required to prepare a ballot title and proposition with the assistance of the attorney general. The proposition "shall give a true and impartial summary of the proposed law."

12. The Summary is contained on page 12 of Attorney General Opinion No. 2019200671 (October 14, 2019) ("AGO") and was sent to Fair Share on October 15, 2019. Fair Share had no prior notice of the language of the Summary and found it was not true and impartial as required by AS 15.45.180(a).

13. Following internal review and discussion of the summary, counsel for Fair Share emailed and phoned counsel for Defendants on multiple occasions from October 18 through October 21 seeking to correct the Summary. Counsel for Fair Share also submitted a redlined version of the Summary indicating the provisions which did not meet the true and impartial

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standard established by law, along with an offer to reimburse the State for any additional printing costs associated with correcting the Summary. On October 21, 2019, counsel for Defendants informed Fair Share they would not meet or discuss the Summary with counsel for Fair Share.

CAUSE OF ACTION

14. Fair Share incorporates each of the preceding paragraphs as though fully set forth herein.

15. Defendant Meyer's determination to use the Summary for the Fair Share Act is improper as a matter of law.

Section 2 (Applicability) of the Fair Share Act

16. In relevant part, Section 2 (Applicability) of the Fair Share Act states that its provisions "only apply to oil produced from fields, units, and nonunitized reservoirs north of 68 degrees north latitude that have produced in excess of 40,000 barrels of oil per day in the previous calendar year *and* in excess of 400,000,000 barrels of total cumulative oil production" (emphasis added). The use of the conjunctive term "and" in the applicability section of the Fair Share Act makes clear both production thresholds must be met before the its provisions apply.

17. In contrast, the Summary's description of Section 2 (Applicability) of the Fair Share Act states that "[t]his act would change the oil and gas production tax for areas of the North Slope where the company produced more than 40,000 barrels of oil per day in the prior year *and/or* more than 400 million barrels total. *It is unclear whether the area has to meet both the 40,000 and 400,000 million* [sic] *thresholds or just one of them*" (emphasis added).

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18. The Summary's description of Section 2 (Applicability) of the Fair Share Act is not a true and impartial description because it incorrectly describes the conjunctive term "and" to mean its opposite, the disjunctive term "or", or something quite different, the combined terms "and/or." The Fair Share Act expressly states its terms "only apply" to areas in which the annual per barrel production threshold "and" the total cumulative production threshold are met. To be true and impartial, the Summary's description should be corrected to use the term "and" and to remove the suggestion that "and" may mean its opposite or something quite different.

19. The Summary's description of Section 2 (Applicability) of the Fair Share Act is also not a true and impartial description because it incorrectly describes the "400 million" barrels of total cumulative oil production threshold as "400,000 million" barrels of total cumulative oil production. The Summary's description of the total cumulative oil production threshold is 1,000 times greater than the one set forth in the Fair Share Act. To be true and impartial, the Summary's description should be corrected to state the correct quantity of oil associated with the total cumulative oil production threshold.

Section 4(b) (Tax on Production Tax Value) of the Fair Share Act

20. In relevant part, Section 1 of the Fair Share Act states, "the Oil and Gas Production Tax in AS 43.55 shall be amended as follows:"

21. In relevant part, Section 4(b) (Tax on Production Tax Value) of the of the Fair Share Act states "An *additional* production tax shall be paid [when the] Production Tax Value of taxable oil is equal to or more than $50. The additional tax shall be the difference between the average monthly Production Tax Value of a barrel of oil and $50, multiplied by the volume

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of taxable oil . . . multiplied by 15 percent" (emphasis added). This Section 4(b) of the Fair Share Act simply adds one additional 15 percent progressive bracket at $50 and above of production tax value.

22. The term "production tax value" is defined under AS 43.55.160. There is only one existing tax on production tax value set forth in AS 43.55, and the existing tax is 35 percent. Nothing in Section 4(b) of the Fair Share Act's language suggests in any manner that it repeals this existing 35 percent tax on production tax value set forth in AS 43.55.011(e).

23. Section 4(b) of the Fair Share Act uses the terms "additional" tax to describe the tax on production tax value in two separate places. This is because Section 4(b) is an "additional" tax on production tax value. This obvious conclusion was even noted in the Attorney General's opinion which stated, "The sponsors likely intended for this to be in addition to the existing tax levied by AS 43.55.011(e)." AGO at 5.

24. In contrast, the Summary deletes the term "additional" when describing the Section 4(b) additional tax on production tax valve and states that Section 4 "does not designate what tax is in addition to [sic]. The result is that this tax would likely always be less than the tax above." This summary is not true and impartial. To state the obvious, there is only one existing tax on production net value and it is set forth in AS 43.55.011(e) and as even the Attorney General's opinion noted, "The sponsors likely intended for this to be in addition to the existing tax levied by AS 43.55.011(e)."

25. Moreover, the Summary deletes the term "additional" and assumes, without supporting language in the Fair Share Act, that the existing tax on production tax value has

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somehow been repealed, and the "additional" tax set forth in Section 4(b) has somehow become the "only" tax on production tax value. This is the only possible explanation behind the interpretive conclusion in the Summary that the Fair Share Act "would likely always be less than" the alternative gross minimum tax under Section 3 of the Fair Share Act. For anyone to interpret Section 4(b) to suggest that an *additional* tax on net production value means the 15 percent additional tax on net production value would become the only tax on net production value in an initiative designed to increase Alaskans' fair share from the sale of their oil is a strained interpretation at best and certainly is not a true and impartial description of Section 4(b) of the Fair Share Act. The Fair Share Act plainly imposes an additional production tax via amendment without repealing or otherwise altering the existing production tax anywhere in its provisions. The summary should be corrected to reflect what the Attorney General correctly noted as the sponsors' intention of enacting an additional tax via amendment.

Section 7 (Public Records) of the Fair Share Act

26. In relevant part, Section 7 (Public Records) of the Fair Share Act states, "All filings and supporting information provided by each producer to the Department relating to the calculation and payment of taxes set forth in Sections 3 and 4 shall be a matter of public record."

27. The common meaning of "matter of public record" in statute and case law is that "a matter of public record" is not confidential. For example, the relevant tax statute AS 40.25.100(a) provides that "[i]nformation in the possession of the Department of Revenue that discloses the particulars of the business or affairs of a taxpayer or other person ... is not *a matter of public record* . . . The information *shall be kept confidential* except when its

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production is required in an official investigation, administrative adjudication ... or court proceeding" (emphasis added). If a document is a matter of public record, confidentiality restrictions do not apply.

28. Again, the Attorney General's opinion correctly states: "'Based on the 'Notwithstanding . . . ' language, we assume this provision is intended to supersede the existing statute for any tax documents submitted for areas falling under section 2 of the initiative bill." AGO at 6. However, the Attorney General's opinion goes on to suggest a contradictory and implausible interpretation which it then chooses to include in the Summary.

29. The Summary states: "The Act would also make all tax documents relating to the calculation and payment of the new taxes a matter of public record. *This would mean the documents would be reviewed under the normal Public Records Act process, and any information that needed to be withheld, for example for privacy or balance-of-interests reasons, would be withheld*" (emphasis added). In the Attorney General's opinion, it suggests the application of the Public Records Act would mean "These [confidential] protections would likely apply to most, if not all, of the tax documents." AGO at 6.

30. Section 7 of the Fair Share Act plainly states that the documents "shall be a matter of public record," and the Attorney General has interpreted this phrase to mean there would be no change to the status quo and the tax documents would continue to be confidential. Such an interpretation would render Section 7 of the Fair Share Act completely meaningless. Sponsors do not often advance initiatives for the purpose of changing nothing. The Summary is far from a true and impartial description of Section 7 of the Fair Share Act.

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31. Even assuming, however, the phrase "a matter of public record" may be subject to varying interpretations in future adjudication, a true and impartial description in the Summary under these circumstances would simply use the actual language of Section 7 and state the tax documents would be "a matter of public record." The purpose of the Summary is to provide a true and impartial description, and this correction would leave post-adoption arguments over interpretation of the phrase "a matter of public record" where they belong-with the courts after adoption and not in the Summary where they do not belong.

PRAYER FOR RELIEF

Plaintiff Fair Share requests that the Court grant the following relief:

A. Declare that the Lieutenant Governor's determination that the prepared summary of the Fair Share Act is true and impartial is incorrect as a matter of law;

B. Declare that the prepared summary of the Fair Share Act is not true and impartial;

C. Issue an injunction requiring the Defendants to correct the prepared summary for the ballot with regard to the inaccuracies detailed above (Fair Share shall submit a proposed corrected summary), without requiring recirculation of the initiative in

D. Award Fair Share its reasonable costs and attorney's fees; and

E. Grant Fair Share such other relief as the Court deems necessary and proper.

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RESPECTFULLY SUBMITTED this 14th day of November, 2019.

BRENA, BELL & WALKER, P.C.
Counsel for Plaintiff

By _____
Robin O. Brena, Alaska Bar No. 8410089
Jon S. Wakeland, Alaska Bar No. 0911066

Certificate of Service
I hereby certify that a true and correct copy of the foregoing document was served by mail and e-mail upon the following this 14th day of November, 2019.

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A BILL

FOR AN ACT ENTITLED

"An Act relating to the oil and gas production tax, tax payments, and tax credits."

BE IT ENACTED BY THE PEOPLE OF THE STATE OF ALASKA:

***Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

SHORT TITLE. This Act shall be known as the "Fair Share Act."

Notwithstanding Any Other Statutory Provisions to the Contrary, the Oil and Gas Production Tax in AS 43.55 Shall Be Amended as Follows:

***Section 2, Applicability.** The provisions in Sections 3 and 4 only apply to oil produced from fields, units, and nonunitized reservoirs north of 68 degrees north latitude that have produced in excess of 40,000 barrels of oil per day in the previous calendar year and in excess of 400,000,000 barrels of total cumulative oil production. For other oil production, the tax shall be unchanged by this Act.

***Section 3, Alternative Gross Minimum Tax.** For oil production from fields, units, and nonunitized reservoirs that meet the conditions in Sec. 2, the amount of tax due for each calendar month shall be no less than:

(a) 10 percent of the gross value at the point of production when the average per-barrel price for Alaska North Slope crude oil for sale on the United States West Coast (La. Basin) during the calendar month for which the tax is due is less than $50;

(b) an additional 1 percent of the gross value at the point of production for each $5 increment by which the average per-barrel price for Alaska North Slope crude oil for sale on the United States West Coast (La. Basin) during the calendar month for which the tax is due is equal to or exceeds $50. The maximum tax rate calculated in this section shall not exceed 15 percent, which is reached when the price per barrel is equal to or exceeds $70; and

(c) No credits, carried-forward lease expenditures, including operating losses, or other offsets may reduce the amount of tax due below the amounts calculated in this section.

EXHIBIT A

***Section 4, Tax on Production Tax Value.** For production from fields, units, and nonunitized reservoirs that meet the conditions in Sec. 2:

(a) The per-taxable-barrel credit in AS 43.55.024(i) and (j) shall not be used; and

(b) An additional production tax shall be paid for each month for which the producer's average monthly Production Tax Value of taxable oil is equal to or more than $50. The additional tax shall be the difference between the average monthly Production Tax Value of a barrel of oil and $50, multiplied by the volume of taxable oil produced by the producer for the month, multiplied by 15 percent.

***Section 5, Separate Treatment.** For each producer, the taxes set forth in Sections 3 and 4 shall be calculated separately for the following:

(a) For oil and for gas;

(b) For each calendar month (annual lease expenditures shall be divided equally among the 12 months of the tax year); and

(c) For each of the fields, units, and nonunitized reservoirs, the lease expenditures shall be calculated, deducted, and carried forward separately.

***Section 6, Greater-of.** For each producer, for each month, and for each of the fields, units, and nonunitized reservoirs, the tax due shall be the greater of the tax under Section 3 or Section 4.

***Section 7, Public Records.** All filings and supporting information provided by each producer to the Department relating to the calculation and payment of the taxes set forth in Sections 3 and 4 shall be a matter of public record.

***Section 8, Scope of Initiative.** Nothing in this Act authorizes or requires the Legislature to dedicate revenue, to make or repeal appropriations, to enact local or special legislation, or to perform any unconstitutional act. While not required by this Act, the revenues from this Act could be used to fund essential government services, capital projects, the permanent fund, and permanent fund dividends.

***Section 9, Severability.** The provisions of this Act are independent and severable, and if any provision of this Act or applicability of any provision to any person or circumstance shall be found to be invalid, the remainder of this Act shall not be affected and shall be given effect to the fullest extent practicable.

EXHIBIT A

THE STATE
of ALASKA
GOVERNOR MICHAEL J. DUNLEAVY

Department of Law
CIVIL DIVISION

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October 14, 2019

The Honorable Kevin Meyer
Lieutenant Governor
P.O. Box 110015
Juneau, Alaska 99811-0015

Re: *19OGTX Ballot Measure Application Review*
AGO No. 2019200671

Dear Lieutenant Governor Meyer:

You asked us to review an application for an initiative bill entitled:

An Act relating to the oil and gas production tax, tax payments, and tax credits. (19OGTX).

Despite the seemingly simple and straightforward title of the initiative bill, the language of the bill is difficult to interpret and raises a number of implementation and constitutional questions. The bill does not follow normal drafting conventions and does not clearly identify what statutes it is seeking to amend or create, while also stating that the new laws would go into effect "notwithstanding" any existing laws to the contrary. Because of these issues, the bill may not accomplish what was actually intended by the initiative sponsors. It is also likely to lead to litigation over the meaning of various provisions and questions of equal protection, due process, and the delegation of authority to Department of Revenue. These various issues are discussed briefly in the first section of this letter describing the proposed initiative bill.

However, none of these issues amount to legal grounds to deny certification of the initiative. Instead, these are mainly post-enactment concerns. The Alaska Supreme Court "refrain[s] from giving pre-enactment opinions on the constitutionality of statutes, whether proposed by the legislature or by the people through their initiative power, since an opinion on a law not yet enacted is necessarily advisory."[1] Because the low threshold

[1] *Kohlhaas v. State*, 147 P.3d 714, 717 (2006).

required of initiatives is met, we conclude that the application complies with the constitutional and statutory provisions governing the initiative process.

I. The proposed initiative bill.

The bill proposed by this initiative would change the production tax applied to certain oil production on the North Slope where the company produced more than 40,000 barrels of oil per day in the prior year and more than 400 million barrels of total cumulative production. This applicability section uses new terms such as "field" and "units," currently not used in the tax code, so it is unclear exactly what areas would fall under this new tax regime.

The initiative bill would change the production tax such that oil meeting the production thresholds stated above would be taxed according to the greater of one of two new taxes. One tax—in Section 3 of the initiative bill—would be a tax on the gross value at the point of production of the oil at a rate of 10 percent when oil is less than $50 per-barrel to a maximum of 15 percent when oil is $70 per-barrel or higher. In existing law, the gross value at the point of production is calculated with deductions for transportation costs.

The other tax—in Section 4 of the initiative bill—is more difficult to ascertain. It would be based on a calculation of a production tax value for the oil that would allow deductions for certain lease expenditures in addition to transportation costs. This tax on production tax value would be calculated based on the difference between the production tax value of the oil and $50, the remainder of which would be multiplied by the volume of the oil, and then the product of that would be multiplied by 15 percent. Where it gets truly confusing is that the initiative bill describes this tax as an "additional production tax," but includes no reference to the tax to which it is meant to be added. Because it is unclear what tax it would be added to, the plain reading of the bill language is that it would not be in addition to any other tax for that oil. The only tax applied could be the so-called "additional tax," and this tax would always be lower than the alternative gross minimum tax in section 3 because of the way they are both calculated. In this event, it is unclear whether the initiative could result in a tax increase or decrease across various oil prices when compared to existing tax law. .

The initiative bill would also eliminate the applicability of certain tax credits and other tax incentives against these two taxes. The taxes would also be calculated for each field, unit, or nonunitized reservoir on a monthly basis, instead of an annual basis.

As a starting point, the initiative bill fails to amend specific statutes and instead includes the general phrase: "Notwithstanding Any Other Statutory Provisions to the Contrary, the Oil and Gas Production Tax in AS 43.55 Shall Be Amended as Follows." It

is unclear how these provisions will actually be inserted into existing statute by the revisor of statutes, which makes it difficult to determine exactly how the initiative bill would change existing law.[2] The vagueness of the language and the lack of definitions would also lead to numerous implementation and potential constitutional concerns post-enactment. In light of the difficulties interpreting this initiative bill, the following provides a sectional summary of the initiative bill and a discussion of the implementation and potential legal concerns with each section.

Section 1 would add the short title "Fair Share Act" to uncodified law.

Section 2 would add an applicability section to establish that the new taxes under section 3 (alternative gross minimum tax) and section 4 (tax on production tax value) apply only to oil produced from "fields, units, and nonunitized reservoirs" north of 68 degrees North latitude that have produced in excess of 40,000 barrels of oil per day (bpd) in the previous calendar year and 400,000,000 barrels of total cumulative oil production. It is unclear from the language in the initiative bill as to whether the change in tax would apply to oil meeting one or both of the above production thresholds. The bill also fails to provide any definitions for "fields, units, or nonunitized reservoirs." These implementation issues may ultimately raise constitutional concerns, such as whether the law unconstitutionally violates equal protection[3] and due process.[4]

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[2] Vagueness or failure to follow technical drafting requirements is not a ground on which an initiative application can be denied.

> The general rule is that a court should not determine constitutionality of an initiative unless and until it is enacted. The rule against pre-election review is a prudential one, steeped in traditional policies recognizing the need to avoid unnecessary litigation, to uphold the people's right to initiative laws directly, and to check the power of individual officials to keep the electorate's voice from being heard."

Alaskans for Efficient Government, Inc. v. State, 153 P.3d 296, 298 (Alaska 2007).

[3] See *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973) (The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from others. The test is whether the difference in treatment is an invidious discrimination); *State v. Reefer King Co., Inc.*, 559 P.2d 56, 65 (Alaska 1976) (the classification in question must "be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike").

[4] See *Pacific Tel. & Tel. Co. v. City of Seattle, Wash.*, 291 U.S. 300, 304 (1934)

Under existing law, the State is divided into segments for purposes of the oil and gas production tax. Oil from the North Slope and gas not used in the state produced on the North Slope are included in one segment. Instead of one North Slope segment for this oil, section 2 would divide the North Slope segment into the "fields, units, and nonunitized reservoirs" that meet the production thresholds and then all other areas would remain under the current oil and gas production tax regime. This would be the first time the terms "fields, units, and nonunitized reservoirs" would be found within the tax statutes, and the initiative bill does not provide any definitions or guidelines for how the Department of Revenue should determine what this means. This raises questions on the delegation of taxing authority and the discretion granted to the Department of Revenue to sort out which areas of the North Slope are taxed under the 19OGTX tax regime and which areas fall under the existing tax statutes.

Additionally, there is a question of when the tax would go into effect if these thresholds are met. Would it occur the next tax year after the threshold was reached or the month after the threshold was reached?

Section 3 would establish a "monthly alternative gross minimum production tax" on oil identified in section 2. The gross tax rate would be 10 percent of the gross value of oil at the point of production in a calendar month where the average per-barrel price for Alaska North Slope (ANS) crude oil for sale on the United States' West Coast is less than $50. The gross tax due under this section would increase by 1 percent of the gross value at the point of production for each $5 increment by which the average per-barrel price for Alaska North Slope crude oil for sale on the United States' West Coast is equal to or exceeds $50. The maximum tax rate under this section may not exceed 15 percent when ANS is $70 per barrel or higher. Credits, carried-forward lease expenditures, operating losses or other offsets may not be used to reduce the amount of tax due below the amounts calculated under section 3.

Under existing law, a tax floor amount is calculated based on the gross value of oil for North Slope oil and gas on a segment basis as part of the annual tax levy. Generally in existing law, the application of tax credits, carried-forward lease expenditures, and other

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> The demands of due process are satisfied if reasonably clear definition is afforded in time to give the taxpayer an opportunity to comply...Before the duties of the administrative officer are performed we cannot say that the ordinance falls short of that requirement. At this stage appellant can show no more than apprehension that the definition which the administrative officer will lay down may be deficient. The Constitution cannot allay that fear.

offsets are not limited to the tax based on production from a particular field or unit. By creating these more discrete segments and a separate monthly tax levy, Department of Revenue would have an increased administrative responsibility to keep track of the different segments and when credits, etc. could be used. It would also have to be done on a monthly basis, instead of an annual basis, which means the per-barrel price of oil will have to be tracked each month, instead of the average over the year.

Section 4 would apply to oil identified in section 2 but only if the monthly tax would be greater under this section than the calculation in section 3 as required by section 6 of the bill. For that oil, the per-taxable-barrel credit under AS 43.55.024(i) and (j) may not be used. Further, a tax would be levied for each month in which a producers' average monthly production tax value for oil is equal to or more than $50. The tax due is the difference between the average monthly production tax value for a barrel of oil and $50, multiplied by the volume of taxable oil produced by that producer in a month, multiplied by 15 percent.

Subsection (b) of this section directs that: "An *additional* production tax shall be paid…" But no effort is made to identify what the "additional production tax" is in addition *to*, and the plain language of the initiative bill does not provide an answer. The sponsors likely intended for this to be in addition to the existing tax levied by AS 43.55.011(e). But the "Notwithstanding" language at the top of the initiative bill would seem to indicate that other tax statutes to the contrary do not apply when the production being taxed falls under the applicability section. Although it is unclear exactly how this section would ultimately be placed into the statutes, the plain reading limits the tax to what is included in section 4—meaning that it is a standalone tax, not added to another tax for that oil.

Section 5 would require that the alternative gross minimum tax (proposed in section 3) and the additional production tax (proposed in section 4) shall be calculated separately for oil and gas in each calendar month. In the monthly calculation, lease expenditures shall be divided equally over the 12 months of the tax year. Further, for each of the subject properties, lease expenditures shall be calculated, deducted, and carried forward separately.

This is the first mention of gas in the initiative bill. Section 2 only applies to oil production and sections 3 and 4 only apply to production that meets the threshold in section 2—which is only oil production. Yet, section 5 states that oil and gas under sections 3 and 4 should be calculated separately. It is unclear what this provision would accomplish. The plain reading of sections 3 and 4 is that they would only apply to oil production and not gas production. This would be an implementation issue for the Department of Revenue.

Section 6 would provide that the tax due in a month shall be the greater of the tax levied under section 3 (alternative gross minimum tax) or section 4 (tax on production tax value).

As mentioned above, the plain meaning of section 6 is that the tax due will be determined by the greater of the calculation in sections 3 or 4, not section 4 plus some other tax. The likely result would be that section 4 is never implemented because the ten to fifteen percent alternative minimum tax is on the gross value and the fifteen percent under section 4 is on the net value. There is no legislative history to help determine the intent for these provisions, and it would be difficult to insert language into the initiative bill or insert another statute that is not expressly referenced.

Section 7 would establish that all filings and supporting information provided to the Department of Revenue relating to the tax calculations of sections 3 and 4 shall be a matter of public record. Although this could raise concerns over the constitutional right to privacy, the reality is that most of the tax documents would still likely be protected from disclosure. This is because making the tax documents "a matter of public record" simply means the Public Records Act applies, instead of being exempt from it. Under the Public Records Act, the Department of Revenue would have to review all the requested records and redact those portions that should be protected for reasons of privacy, proprietary information, or balance of interests, for example. These protections would likely apply to most, if not all, of the tax documents.

This section would conflict with current law that actually makes it a crime to disclose confidential tax documents.[5] Based on the "Notwithstanding..." language, we assume this provision is intended to supersede the existing statute for any tax documents submitted for areas falling under section 2 of the initiative bill. This could be difficult to implement for the Department of Revenue because a document may contain information about multiple areas or require multiple different tax filings in order to keep them separate.

Section 8 states that nothing in the proposed legislation requires a dedication of revenue, enactment of local or special legislation, or performance of an unconstitutional act. The section would provide that the legislature could, but is not required to, use the revenues obtained from enactment of this act for essential government services, capital projects, the permanent fund, and permanent fund dividends.

Section 9 is a severability clause.

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5 AS 43.05.230.

II. Analysis.

Under AS 15.45.070, the lieutenant governor must review an application for a proposed initiative bill within 60 calendar days of receipt and "certify it or notify the initiative committee of the grounds for denial." The application for the 19OGTX initiative was filed with the Division of Elections on August 16, 2019. The sixtieth calendar day after the filing of the initiative is Tuesday, October 15, 2019.

Under AS 15.45.080, certification shall be denied only if: "(1) the proposed bill to be initiated is not confined to one subject or is otherwise not in the required form; (2) the application is not substantially in the required form; or (3) there is an insufficient number of qualified sponsors."

A. Form of the proposed initiative bill.

In evaluating an application for an initiative bill, you must determine whether the application is in the "proper form."[6] Specifically, you must decide whether the application complies with "the legal procedures for placing an initiative on the ballot, and whether the initiative contains statutorily or constitutionally prohibited subjects which should not reach the ballot."[7]

The form of an initiative bill is prescribed by AS 15.45.040, which requires four things: (1) that the bill be confined to one subject; (2) that the subject be expressed in the title; (3) that the bill contain an enacting clause stating: "Be it enacted by the People of the State of Alaska"; and (4) that the bill not include prohibited subjects. The list of prohibited subjects is found in article XI, section 7 of the Alaska Constitution and AS 15.45.010. An initiative bill includes a prohibited subject when it makes or repeals appropriations; enacts local or special legislation; dedicates revenue; or creates courts, defines their jurisdiction, or prescribes their rules.[8] You may deny certification only if the measure violates one or more of these restrictions, or if "controlling authority establishes its unconstitutionality."[9]

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6 Alaska Const. art. XI, § 2.

7 *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 87 n.7 (Alaska 1988).

8 AS 15.45.010; *see also* Alaska Const. art. XI, § 7 (prohibiting dedicating revenue, creating courts, defining court jurisdiction or prescribing court rules).

9 *Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 900 n. 22 (Alaska 2003) (this is an exception to the general rule that the court will not review the constitutionality of legislation or initiative pre-enactment; the example given is a bill requiring segregation in direct violation of *Brown v. Board of Educ. Of Topeka, Kan.*, 349 U.S. 294 (1955)).

The initiative bill meets all four requirements of AS 15.45.040. It is confined to one subject—oil and gas taxation. The subject is expressed in the title, and the bill has the required enacting clause. Finally, it does not include any of the prohibited subjects and is not clearly unconstitutional under existing authority.

When evaluating the initiative bill, we carefully considered whether the initiative bill would enact local or special legislation and whether it violates the single-subject rule. When reviewing ballot initiatives, the court will "construe voter initiatives broadly so as to preserve them whenever possible. However, whether an initiative complies with article XI, section 7's limits on the right of direct legislation requires careful consideration."[10]

In order to determine if the initiative bill would enact special or local legislation, the court first considers "whether the proposed legislation is of general, statewide applicability."[11] If the answer is yes, then there is no violation. But if the answer is no, you must then ask "whether the initiative nevertheless bears a fair and substantial relationship to legitimate purposes."[12] This is similar to the most deferential standard applied in an equal protection review.[13] The court has also said the legislation or initiative bill "need not operate evenly on all parts of the state to avoid being classified as local or special."[14]

19OGTX further divides what is currently known as the North Slope segment for purposes of the oil and gas production tax. Instead of one North Slope segment, the initiative bill appears to divide the North Slope into "fields, units and nonunitized reservoirs"[15] that meet the applicability section and other areas that do not meet the applicability section. The purpose of these changes is presumably to increase the State's share of money from oil and gas development. Oil and gas development generally is a matter of statewide concern and will have statewide impacts both in the private sector and the public sector. Previous court cases have found that maximizing the economic benefits of oil and gas production to the people of Alaska is a legitimate state purpose.[16] This initiative bill would further divide the North Slope segment with the goal of bringing

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10 *Hughes v. Treadwell*, 341 P.3d 1121, 1125 (Alaska 2015).

11 *Id.* at 1131.

12 *Ibid.*

13 *Ibid.*

14 *Boucher v. Engstrom*, 528 p.2d 456, 463 (Alaska 1974).

15 These terms are not currently found in the Department of Revenue statutes or regulations governing taxation. Likewise, the term "nonunitized reservoir" is not currently found in the Department of Natural Resources statutes or regulations.

16 *Baxley v. State*, 958 P.2d 422, 431 (Alaska 1998).

more money into the state treasury, which in turn funds government services. Similar to bills amending Northstar oil and gas leases,[17] authorizing a three-way land exchange,[18] and excluding Fairbanks and Anchorage from being the capital,[19] this initiative bill appears to bear a fair and substantial relationship to the legitimate purpose of developing the State's oil and gas resources in the interest of all Alaskans. Therefore, it is not considered special or local legislation.

We also evaluated whether 19OGTX violates the single-subject rule because it includes both a substantive change to oil and gas laws as well as a change to the way tax records are treated and a statement on what the revenue could be spent on. Article II, section 13 of the Alaska Constitution requires that "[e]very bill shall be confined to one subject." In the context of initiative bills, the single-subject rule is intended to protect "the voters' ability to effectively exercise their right to vote by requiring that different proposals be voted on separately."[20] Confining initiative bills to one subject assures both that voters can "express their will through their votes more precisely," and "prevents the adoption of policies through stealth or fraud, and prevents the passage of measures lacking popular support by means of log-rolling."[21] Log-rolling, the Court has explained, "consists of deliberately inserting in one bill several dissimilar or incongruous subjects in order to secure the necessary support for passage of the measure."[22]

We conclude that 19OGTX does not violate the single-subject rule because the provisions all relate to the administration of the proposed oil and gas tax. Section 7 of the initiative bill relates specifically to the tax records filed under "the calculation and payment of the taxes set forth in Section 3 and 4." It is not a separate and distinct proposal on public records, but rather implements how documents that are created because of the new tax should be handled. Under existing law, these documents are all confidential and are not considered public records.[23] This initiative bill would make the

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17 *Id.* at 430-431.

18 *State v. Lewis*, 559 P.2d 630, 643 (Alaska 1977).

19 *Boucher v. Engstrom*, 528 P.2d 456, 462-64 (Alaska 1974).

20 *Id.*

21 *Id.*

22 *Gellert*, 522 P.2d at 1122; see also Proceedings of the Alaska Constitutional Convention at 1746-47 (discussion of the single-subject requirement and the concern over log-rolling).

23 AS 40.25.100, 43.05.230.

tax documents filed under the new tax regime public records and subject to the Public Records Act, including the protections provided under the Public Records Act like proprietary information and balance of interests.[24]

Additionally, section 8 of the initiative bill does not amount to a separate and distinct subject. Section 8 simply states the legal reality that revenues generated by the new oil and gas tax "*could* be used to fund essential government services, capital projects, the permanent fund, and permanent fund dividends." It does not attempt to dedicate the funds to any particular purpose or create a new program that would be funded by this money. Oil and gas tax and royalties make up the majority of the money in the state general fund, which is then used to pay for the State's budget. Section 8 of the bill is acknowledging this fact and does not create any new distinct proposal that would amount to log-rolling, even if the language is clearly included to entice people to vote for the initiative bill.

The conclusion that an initiative bill satisfies the constitutional and statutory requirements does not speak to the initiative bill's ultimate constitutionality or workability. The Alaska Supreme Court "refrain[s] from giving pre-enactment opinions on the constitutionality of statutes, whether proposed by the legislature or by the people through their initiative power, since an opinion on a law not yet enacted is necessarily advisory."[25] The question is about timing—when is a lawsuit challenging an initiative bill proper, and the answer is often after the initiative bill has been enacted. As detailed in the discussion above regarding the initiative bill's provisions, 19OGTX raises many questions that cannot be answered until the revisor of statutes places the initiative bill in the statutes and the Department of Revenue adopts regulations interpreting the new statutory provisions. At this stage, "all doubts as to all technical deficiencies or failure to comply with the exact letter of procedure will be resolved in favor of the" liberal construction of the initiative bill.[26] This in no way forecloses, and we do not opine on, future litigation over the constitutionality or interpretation of the initiative bill post-enactment. There are significant constitutional issues that can be argued with respect to this bill. However, these issues must be addressed by the courts post-enactment if legal challenges are made.

B. Form of the application.

The form of an initiative application is prescribed by AS 15.45.030, which provides that the application must include the

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24 AS 40.25.120(4), (12), (14)

25 *Kohlhaas v. State*, 147 P.3d 714, 717 (2006).

26 *Yute Air Alaska Inc. v. McAlpine*, 698 P.2d 1173, 1181 (Alaska 1974).

(1) proposed bill;

(2) printed name, the signature, the address, and a numerical identifier of not fewer than 100 qualified voters who will serve as sponsors; each signature page must include a statement that the sponsors are qualified voters who signed the application with the proposed bill attached; and

(3) designation of an initiative committee consisting of three of the sponsors who subscribed to the application and represent all sponsors and subscribers in matters relating to the initiative; the designation must include the name, mailing address, and signature of each committee member.

The application on its face meets the first requirement, as well as the latter portion of the second requirement regarding the statement on each signature page. With respect to the first clause of the second requirement, we understand the Division of Elections has reviewed the sponsor signatures and determined that the application contains the signatures and addresses of 163 qualified voters. The application also designates three sponsors to serve on an initiative committee, thus satisfying the third requirement. Therefore, the application is in the proper form.

III. Proposed ballot and petition summaries.

We have prepared a ballot-ready petition title and summary to assist you in complying with AS 15.45.090(2) and AS 15.45.180, as is our office's standard practice. Under AS 15.45.180 a ballot proposition must include a "true and impartial summary of the proposed law." That provision also requires that an initiative's title be limited to 25 words, and that the number of words in the body of the summary be limited to the number of sections in the proposed law multiplied by fifty. "Section" is defined as "a provision of the proposed law that is distinct from other provisions in purpose or subject matter."

The bill has nine sections, which would allow the number of words in the summary not to exceed 450. Below is a summary with 20 words in the title and 396 words in the summary, which we submit for your consideration.

An Act changing the oil and gas production tax for certain fields, units, and nonunitized reservoirs on the North Slope

This act would change the oil and gas production tax for areas of the North Slope where the company produced more than 40,000 barrels of oil per day in the prior year and/or more than 400 million barrels total. It is unclear whether the area has to meet both the 40,000 and 400,000 million thresholds or just one of them. The new areas would be divided up based on "fields, units, and nonunitized reservoirs" that meet the production threshold. The Act does not define what a field or unit is. For any areas that meet the production threshold, the tax would be the greater of one of two new taxes.

(1) One tax would be a tax on the gross value at the point of production of the oil at a rate of 10% when oil is less than $50 per-barrel. This tax would increase to a maximum of 15% when oil is $70 per-barrel or higher. No deductions could take the tax below the 10% to 15% floor.

(2) The other tax would be based on a calculation of a production tax value for the oil that would allow lease expenditure and transportation cost deductions. This tax on production tax value would be calculated based on the difference between the production tax value of the oil and $50. The difference between the two would be multiplied by the volume of oil, and then that amount would be multiplied by 15%. The existing per-taxable-barrel credit would not apply. The Act uses the term "additional tax" but it does not designate what tax is in addition to. The result is that this tax would likely always be less than the tax above.

The Department of Revenue would calculate the tax for each field, unit, or nonunitized reservoir on a monthly basis. Taxes are currently calculated on an annual basis, with monthly estimated payments. Since these new taxes would only apply to certain areas, a taxpayer would still have to submit annual taxes for the areas where the new taxes do not apply.

The Act would also make all tax documents relating to the calculation and payment of the new taxes a matter of public record. This would mean the documents would be reviewed under the normal Public Records Act process, and any information that needed to be withheld, for example for privacy or balance-of-interests reasons, would be withheld.

Should this initiative become law?

This summary has a Flesch test score of 54.7. We believe the summary satisfies the target readability standards of AS 15.80.005.[27]

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[27] Under AS 15.80.005(b), "The policy of the state is to prepare a neutral summary that is scored at approximately 60." While this summary is slightly below the target readability score of 60, the Alaska Supreme Court has upheld ballot summaries scoring as

IV. Conclusion.

Despite the failure to follow technical drafting requirements, the proposed bill and application are in the proper form for an initiative and the application complies with the constitutional and statutory provisions governing the use of the initiative. We therefore recommend that you certify the initiative bill application and notify the initiative committee of your decision. You may then begin to prepare a petition under AS 15.45.090.

Please contact us if we can be of further assistance to you on this matter.

Sincerely,

KEVIN J. CLARKSON
ATTORNEY GENERAL

By:

Cori Mills
Assistant Attorney General

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low as 33.8 for a complicated ballot initiative. *See* 2007 Op. Att'y Gen. (Oct. 17; 663070179); *Pebble*, 215 P.3d at 1082-84.

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

VOTE YES FOR ALASKA'S FAIR SHARE, Plaintiff, v. KEVIN MEYER, LIEUTENANT GOVERNOR OF THE STATE OF ALASKA, and STATE OF ALASKA, DIVISION OF ELECTIONS, Defendants.	Case No. 3AN-19-11106 CI

DEFENDANTS' ANSWER

Defendants Lieutenant Governor Kevin Meyer and the Division of Elections respond to the allegations in Plaintiff Vote Yes for Alaska's Fair Share's (Fair Share) Complaint in the following paragraphs. The Complaint also included an Introduction that appears to present a summary of Fair Share's legal argument. In so far as the Introduction presents legal arguments and conclusions, Defendants deny any legal conclusions set forth in the Introduction. Also, any allegations in the Introduction require no response as the allegations are improperly pled for lack of separate statements required under Alaska Civil Rule 10(b). It is worth noting that Fair Share's Complaint suffers from a foundational misunderstanding of the initiative process. The Complaint refers to the statute on creating a ballot summary, but is complaining of the language that was included in the petition summary under AS 15.45.090(a)(2). These are two different requirements. The lieutenant governor creates a ballot summary only if

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the petition is certified under AS 15.45.150-.160. That has not occurred yet, and therefore, the lieutenant governor has taken no action to create a ballot summary.

1. The defendants admit that Robin O. Brena, Jane R. Angvik, and R. Merrick Pierce are the initiative committee sponsors for the 19OGTX initiative application. The defendants lack sufficient information to admit or deny the remaining allegations in Paragraph 1.

2. Admitted.

3. Admitted.

4. The defendants admit the superior court is the proper court to hear this matter but deny that the relief requested and the timing of the lawsuit are legally appropriate.

5. The defendants admit that this paragraph accurately quotes AS 15.45.240.

6. Denied.

7. The defendants admit the determination on certification of the application was sent to the sponsors on October 15, 2019, and that Fair Share brought this complaint within 30 days of that notification, but the defendants deny that the relief requested and the timing of the lawsuit are legally appropriate.

8. Admitted.

9. Admitted.

10. The defendants admit this paragraph accurately quotes paragraphs (1)-(3) of AS 15.45.080, but deny any legal interpretation implied by the use of the term "only."

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11. The defendants admit that Lieutenant Governor Meyer certified the application on October 15, 2019. The defendants deny that Lieutenant Governor Meyer had any legal obligation to prepare a ballot title and proposition under AS 15.45.180(a) because that duty is triggered by certification of the petition under AS 15.45.150-.160, not certification of the application under AS 15.45.070-.080. The defendants admit that this paragraph accurately quotes part of the third sentence of AS 15.45.180(a).

12. The defendants admit that page 12 of the Attorney General Opinion contains a proposed ballot summary, but deny that any official ballot summary exists at this stage. The defendants admit that the Attorney General Opinion was sent to Fair Share on October 15, 2019, and this provided notice to Fair Share of a proposed ballot summary drafted by the Department of Law. All remaining allegations in this paragraph are denied.

13. The defendants deny that there were any communications regarding a ballot summary under AS 15.45.180; the email communications received from Fair Share related to the summary for purposes of the petition under AS 15.45.090(a)(2). The defendants admit the remainder of the allegations.

14. The defendants refer to their responses to paragraphs (1)-(13).

15. Denied.

16. The defendants admit that this paragraph accurately quotes part of the first sentence of Section 2 of the initiative bill. All remaining allegations in this paragraph are denied.

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17. Admitted in so far as it is quoting the petition summary or the proposed summary in the Attorney General Opinion.

18. Denied.

19. The defendants admit the petition summary includes a typo where it should say 400 million instead of "400,000 million." All remaining allegations are denied.

20. The defendants admit that this paragraph accurately quotes part of the heading on page 1, lines 9-10 of the initiative bill.

21. The defendants admit that this paragraph accurately quotes parts of the first and second sentences of Section 4(b) of the initiative bill, excluding the parenthetical "[when the]." All remaining allegations are denied.

22. The defendants admit that AS 43.55.011(e)(2) levies a tax for certain oil and gas produced equal to the annual production tax value of the taxable oil and gas as calculated under AS 43.55.160(a)(1) multiplied by 35 percent. All remaining allegations are denied.

23. The defendants admit that Section 4(b) of the initiative bill uses the term "additional tax" in two places and this paragraph accurately quotes a sentence from the Attorney General Opinion. All remaining allegations are denied.

24. The defendants admit that this paragraph accurately quotes parts of the petition summary or the summary proposed in the Attorney General Opinion. The defendants also admit that this paragraph accurately quotes a sentence from the Attorney General Opinion. All remaining allegations are denied.

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25. Denied.

26. The defendants admit that this paragraph accurately quotes Section 7 of the initiative bill.

27. The defendants admit that this paragraph accurately quotes parts of AS 40.25.100(a). All remaining allegations are denied.

28. The defendants admit that this paragraph accurately quotes a sentence from the Attorney General Opinion. All remaining allegations are denied.

29. The defendants admit that this paragraph accurately quotes the petition summary or the proposed summary in the Attorney General Opinion. The defendants also admit that, except for the added parenthetical "[confidential]," this paragraph accurately quotes a sentence from the Attorney General Opinion.

30. The defendants admit that Section 7 of the initiative bill states that the documents "shall be a matter of public record." All remaining allegations are denied.

31. Denied.

AFFIRMATIVE DEFENSES

1. The plaintiff's complaint is not ripe.

2. The plaintiff's prayer for relief is improper and unlawful.

3. The plaintiff fails to state a claim for which relief may be granted.

4. The plaintiff may not be an aggrieved person and thus may lack standing.

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PRAYER FOR RELIEF

The defendants pray for judgment and relief as follows:

1. That the Complaint be dismissed with prejudice on all claims asserted against all defendants;

2. That the defendants be awarded all attorney's fees and costs allowed by law.

DATED February 10, 2020

KEVIN G. CLARKSON
ATTORNEY GENERAL

By:
for Cori M. Mills
Assistant Attorney General
Alaska Bar No. 1212140

for Margaret Paton-Walsh
Chief Assistant Attorney General
Alaska Bar No. 0411074

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

VOTE YES FOR ALASKA'S FAIR SHARE, Plaintiff, v. KEVIN MEYER, LIEUTENANT GOVERNOR OF THE STATE OF ALASKA, and STATE OF ALASKA, DIVISION OF ELECTIONS, Defendants.	Case No. 3AN-19-11106 CI

#1 **DEFENDANTS' MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT MOTION**

I. INTRODUCTION

Plaintiff Vote Yes for Alaska's Fair Share (sponsors) filed this lawsuit to challenge the petition summary included on the petition booklets issued back in October 2019. These claims are now irrelevant and moot. The sponsors gathered the requisite number of qualified signatures, and the lieutenant governor determined that the 19OGTX initiative shall be placed on the general election ballot. At this point, the only summary that could be at issue is the ballot summary, which was provided to sponsors on March 17, 2020 along with notice of the lieutenant governor's determination. The language in the ballot summary differs from the language in the petition summary, and the differences either negate or minimize sponsors' claims concerning the petition summary.

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It is the burden of the sponsors to show that the ballot summary is biased or misleading, and great deference is given to the lieutenant governor. Sponsors will not be able to overcome their burden in this case. The ballot summary objectively informs voters of what the initiative bill proposes to do and ensures that the voters have accurate information, including information on areas where the language in the initiative bill is ambiguous and would be left to implementation decisions by the Department of Revenue. Contrary to sponsors' desire, the lieutenant governor's job is not to recite how the sponsors would prefer the law to be implemented, but rather summarize the actual text of the initiative bill. Sponsors have an opportunity to tell voters their preferences and intent in a supporting statement inserted into the election pamphlet.

Both because sponsors failed to meet the 30-day deadline to challenge the ballot summary and because the ballot summary meets all statutory requirements, the court should grant summary judgment in favor of Defendants Lieutenant Governor Kevin Meyer and the Division of Elections (together "State") and dismiss this lawsuit.

II. FACTS

Sponsors filed their initiative application, identified as 19OGTX by the Division of Elections ("Division"), on August 16, 2019.[1] Exhibit (Ex.) 1. The initiative bill was titled: "An Act relating to the oil and gas production tax, tax payments, and tax

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[1] All of the information on filings and notifications relating to the initiative along with links to the documents are publicly available on the Division of Election's website found at http://www.elections.alaska.gov/Core/initiativepetitionlist.php#19OGTX. The most relevant documents are also included as exhibits to this memorandum.

credits." Ex. 1. Lieutenant Governor Kevin Meyer certified the application on October 15, 2019, and sent notice of certification and a copy of the Attorney General Opinion to sponsors. Plaintiff's Complaint (Pl. Complaint), Ex. B. The petition summary included in the petition provided to sponsors on October 23, 2019 used the proposed language from the Attorney General Opinion. Ex. 1; Pl. Complaint, Ex. B at pp. 12.

On November 14, 2019, within 30 days of receiving notification, sponsors filed this complaint challenging the petition summary. Pl. Complaint. Despite the complaint alleging the petition summary was "improper as a matter of law," the complaint did not request that the petition summary be corrected. Pl. Complaint at ¶15. Instead, the complaint asked that the allegedly improper petition summary be circulated, while requiring that any future ballot summary be written differently. Pl. Complaint at pp. 11. In other words, the complaint appears to have conflated the petition summary requirement under AS 15.45.090(a)(2) with the ballot summary requirement under AS 15.45.180. For this reason, the defenses in State's Answer included dismissal on the grounds that the relief requested could not be granted. Defendant's Answer at pps. 1, 5.[2] If the sponsors only cared about the ballot summary, they needed to wait to find out what the ballot summary would actually include.

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[2] "It is worth noting that Fair Share's Complaint suffers from a foundational misunderstanding of the initiative process . . . The lieutenant governor creates a ballot summary only if the petition is certified under AS 15.45.150-.160. That has not occurred yet, and therefore, the lieutenant governor has taken no action to create a ballot summary." Def. Answer at pp. 1.

This brings us to the present status of 19OGTX. On March 17, 2020, the lieutenant governor sent notice to sponsors that the 19OGTX petition was properly filed, including notice of the final ballot summary language. Ex. 2. The following is the language of the final ballot summary, which differs from the petition summary (see Affidavit of Cori M. Mills (Mills Aff.), Ex. 3, comparing the two summaries):

> **An Act changing the oil and gas production tax for certain fields, units, and nonunitized reservoirs on the North Slope**
>
> This act would change the oil and gas production tax for areas of the North Slope where a company produced more than 40,000 barrels of oil per day in the prior year and more than 400 million barrels total. The new areas would be divided up based on "fields, units, and nonunitized reservoirs" that meet the production threshold. The act does not define these terms. For any areas that meet the production threshold, the tax would be the greater of one of two new taxes.
>
> (1) One tax would be a tax on the gross value at the point of production of the oil at a rate of 10% when oil is less than $50 per-barrel. This tax would increase to a maximum of 15% when oil is $70 per-barrel or higher. No deductions could take the tax below the 10% to 15% floor.
>
> (2) The other tax, termed an "additional tax," would be based on a calculation of a production tax value for the oil that would allow lease expenditure and transportation cost deductions. This tax on production tax value would be calculated based on the difference between the production tax value of the oil and $50. The difference between the two would be multiplied by the volume of oil, and then that amount would be multiplied by 15%. The existing per-taxable-barrel credit would not apply. The act uses the term "additional tax" but it does not specify what the new tax is in addition to.
>
> The tax would be calculated for each field, unit, or nonunitized reservoir on a monthly basis. Taxes are currently calculated on an annual basis, with monthly estimated payments. Since these new taxes would only apply to certain areas, a taxpayer would still have to submit annual taxes for the areas where the new taxes do not apply.
>
> The act would also make all filings and supporting information relating to

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the calculation and payment of the new taxes "a matter of public record." This would mean the normal Public Records Act process would apply.

Should this initiative become law?

Because the ballot summary differs from the petition summary, it is unclear what claims sponsors have regarding the ballot summary. Sponsors have not amended their complaint or filed a new complaint challenging the ballot summary, instead of the petition summary. The State was unaware sponsors wanted to challenge the ballot summary until the State's counsel reached out to sponsors' counsel in advance of the status hearing on April 22, 2020. Mills Aff. at ¶ 4. By this time, the 30-day deadline to challenge the ballot summary had already expired on April 16, 2020.

III. STANDARD OF REVIEW

Summary judgment is appropriate "if there is no genuine factual dispute and the moving party is entitled to judgment as a matter of law."[3] In the context of a ballot summary, the court gives deference to the lieutenant governor's summary.[4] This deference is such that "if reasonable minds may differ" as to the ballot summary, the ballot summary should be upheld.[5] The court "will not invalidate the summary simply because [it] believe[s] a better one could be written; instead, the lieutenant governor's summary will be upheld unless [the court] cannot reasonably conclude that the summary

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3 *Planned Parenthood of Alaska v. State*, 232 P.3d 725, 729 (Alaska 2010).

4 *Id.*

5 *Burgess v. Alaska Lieutenant Governor Terry Miller*, 654 P.2d 273, 276 n.7 (Alaska 1982) (internal citations omitted).

is impartial and accurate."[6] Whether this case should be dismissed as untimely and whether the ballot summary meets statutory requirements are all questions of law appropriate to be determined on summary judgment.[7]

IV. ARGUMENT

Sponsors' challenge to the ballot summary is both untimely and lacks merit, as discussed further below. For these reasons, the complaint should be dismissed, and summary judgment granted in favor of the State.

A. The lawsuit should be dismissed because the claims regarding the petition summary are moot and any claims against the final ballot summary are barred by the 30-day statute of limitations.

The complaint in this case challenged the *petition summary* included on the petition booklets under AS 15.45.090(a)(2), which were provided on October 23, 2019. Ex. 1. Any dispute over the petition summary is now moot because the lieutenant governor determined the petition was properly filed on March 17, 2020 and directed that it go on the general election ballot. Ex. 2.

Having their initially raised claim been rendered squarely moot, sponsors now seek to challenge the *ballot summary* under AS 15.45.180. But because the sponsors received notice of that language on March 17, 2020, any challenge to the lieutenant governor's determination in that regard had to be filed within 30 days of sponsors'

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6 *Planned Parenthood*, 232 P.3d at 729 (internal citations and quotations omitted).

7 *State v. American Civil Liberties Union of Alaska*, 204 P.3d 364, 368 (Alaska 2009).

receiving notice of the determination—which would have been April 16, 2020.[8] Because 30 days have passed and sponsors failed to amend their complaint or file a new complaint, sponsors' challenge to the ballot summary is untimely, and the lawsuit should be dismissed.

i. The petition summary and ballot summary requirements are statutorily and practically different from one another.

Although petition summaries and ballot summaries are held to the same legal standards for accuracy and impartiality, these summaries represent two distinct statutory requirements. The summaries are prepared at different points in time and may differ in certain technical aspects. The first of these summaries is the petition summary. By law, the lieutenant governor must prepare a petition summary, "an impartial summary of the subject matter of the bill," *before* an initiative is circulated for signatures.[9] The petition provides the information necessary for voters to determine whether they want to sign the petition and support the initiative being placed on the ballot.

The division may not even need to prepare a ballot summary until sometime later. "A ballot title and proposition"—i.e. a ballot summary—must be prepared "[i]f the petition is properly filed."[10] Like a petition summary, "[t]he proposition shall give a true and impartial summary of the proposed law."[11] But, the ballot summary also has

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8 AS 15.45.240.

9 AS 15.45.090(a)(2).

10 AS 15.45.180(a).

11 Id.

additional requirements regarding word count and readability standards that do not apply to petition summaries.[12] For example, the summary cannot exceed the number of sections in the initiative bill multiplied by 50.[13]

The Alaska Supreme Court has recognized the differences between petition summaries and ballot summaries. The Court has described the purpose of the petition summary as assisting in screening initiatives by ensuring "that only propositions with significant public support are included on the ballot."[14] On the other hand, "[t]he basic purpose of the ballot summary . . . is to enable voters to reach informed and intelligent decisions on how to cast their ballots—decisions free from any partisan suasion."[15]

Petition summaries and ballot summaries may, but are not legally required to, mirror one another. Nothing in state law dictates that the two summaries bc identical. The lieutenant governor is authorized to amend language that appeared on a petition summary when later crafting a ballot summary—so long as it remains impartial and accurate and otherwise meets the requirements of AS 15.45.180 and AS 15.80.006—if, for example, the modified language more clearly conveys the purpose of the ballot proposition to help voters make an informed decision. Thus, although similar, the petition summary and ballot summary cannot be conflated, and the sponsor's legal challenge to the language in one cannot be grafted onto the language of the other.

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12 A readability test has to be applied under AS 15.80.005.

13 AS 15.45.180.

14 *Planned Parenthood of Alaska*, 232 P.3d at 729.

15 *Id.* at 730 (internal quotations omitted).

ii. The sponsors failed to strictly comply with the 30-day statute of limitations, barring any claims against the ballot summary.

Because the ballot summary is a distinct statutory requirement, sponsors were required to make any claims regarding the ballot summary within the strict 30-day timeline under AS 15.45.240. In this case, the 30-day timeline for the sponsors to challenge the ballot summary expired on April 16, 2020—30 days after the Division provided the sponsors notice of the ballot summary. By failing to amend their complaint or file a new complaint within 30 days of receiving notice, the sponsors neglected to comply with clear statutory deadlines, which must be strictly adhered to, and their lawsuit should be dismissed as untimely.

In *McAlpine v. University of Alaska*, the Alaska Supreme Court recognized that "sound and important public policies are in favor of requiring challenges to be brought within thirty days."[16] In rejecting a third party's untimely challenge to whether an initiative was improperly certified, the Court in *McAlpine* observed that "a quick challenge allows the sponsors to correct the problem prior to gathering signatures in hope of still getting the proposed bill on the next ballot. This facilitates the enactment of laws by initiative, thus comporting with our deferential attitude towards initiatives."[17] The same logic applies here, at the ballot summary stage, given the need to allow the Division sufficient time to prepare materials for the primary or general election ballot.

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16 762 P.2d 81, 85 (Alaska 1988) (internal citation and quotations omitted).

17 *Id.*

The Alaska Supreme Court has stated: "The legal principle is well established, both in Alaska and in other jurisdictions, that election law filing deadlines are to be strictly enforced. Strict compliance is the rule, and substantial compliance the rare exception."[18] The Alaska Supreme Court favorably cited the Maryland Supreme Court's acknowledgment of this same principle, recognizing that strict compliance applies "in view of the necessity for making timely preparations for elections."[19] Just as with candidacy deadlines, there is an acute need for finality in the initiative context in order to allow the Division to undertake "timely preparations for elections." Requiring strict adherence to statutory deadlines also facilitates "the enactment of laws by initiative" by ensuring that the language that ultimately appears on the ballot is known sufficiently in advance by voters, interest groups, and the Division. By getting election materials out in a timely manner and avoiding any uncertainty in the final language, the electorate can rely on the information in evaluating how they would like to vote. The goal is to encourage voters to be informed *before* casting a ballot, not while at the voting booth.

Sponsors may argue that a week or two delay is harmless, but this ignores the larger picture and the multiple layers of federal and state requirements the Division has to follow. Federal law requires absentee ballots be sent to certain uniformed and overseas citizens 45 days in advance of the election.[20] Federal law also requires

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[18] *Falke v. State*, 717 P.2d 369, 373-74 (Alaska 1986) (rejecting use of substantial compliance doctrine in the absence of statutory ambiguity).

[19] *Andrews v. Secretary of State*, 235 Md. 106, 200 A.2d 650 (MD Ct. of App. 1964).

[20] 42 U.S.C. § 1973ff et seq.

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language assistance—this includes written translations for certain languages and oral voting assistance for other languages.[21] In order to make sure language assistance is available, the relevant election materials, in particular the ballot title and proposition that will appear on the ballot, have to be translated into all the covered languages. Under state law, an election pamphlet, which includes the ballot summary, must be distributed to every registered voter at least 22 days before the election.[22] Other requirements include training poll workers, sending the ballots and other materials to the polling places, and giving public notice of the election.[23]

Strictly enforcing the 30-day timeline, and all other election timelines, ensures finality for all sides to move forward with an election and avoid potential uncertainty. Since a ballot measure could end up on either the primary or general election ballot depending on when the legislature adjourns,[24] the 30-day timeline is particularly important when challenging a ballot summary. This leaves an extraordinarily truncated timeline to have issues resolved in time to comply with the federal and state law.

The fact that the sponsors filed a challenge to the petition summary does not relieve them of their independent obligation to raise a timely challenge to the ballot summary, nor can it reasonably be construed to have put the Division on legal notice such a challenge was forthcoming. Because the petition summary is separate and

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21 42 U.S.C. § 1973aa-1a.

22 AS 15.58.080.

23 AS 15.10.107, 15.15.050, 15.15.070.

24 AK Const., art. XI, § 4.

distinct from the ballot summary, complying with a timeline to challenge the former does not equate with satisfying the timeline to challenge the latter. The court should reject any invitation to inject a substantial compliance standard into this context. The only cases where the Alaska Supreme Court applied substantial compliance involved ambiguities in the law that made it difficult for the filer to know what the deadlines were.[25] In this case, there is no ambiguity—any aggrieved person must file a challenge within 30 days of the lieutenant governor's determination.[26]

The ballot summary differs in many of the respects that the complaint took issue with on the petition summary. Ex. 3. The State was wholly unaware of the sponsors' ostensible claims regarding the ballot summary until the *State* contacted the sponsors on April 20, 2020 out of courtesy in preparation for the status hearing on April 22, 2020. Mills Aff. at ¶4. Up until that point, the State understood that the sponsors' challenge to the petition summary had been mooted since the lieutenant governor had authorized that 19OGTX be filed and appear on the ballot. And the sponsors' delay in challenging the ballot summary results in the same harms the courts have identified in other cases—namely, uncertainty heading into an election and insufficient time to remedy any errors that are identified. The extent of the risk of that harm in any given case is not the issue—the standard must be applicable to any challenger in any case and the importance

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25 *Falke*, 717 P.2d at 373-74.

26 AS 15.45.240.

of elections deadlines is itself sufficient to warrant strict adherence to deadlines in this context.

Sponsors had an obligation to either amend their complaint or file a new complaint within 30 days of receiving notification of the ballot summary. The sponsors failed to do so, and therefore, this lawsuit should be dismissed.

B. The ballot summary gives a true and impartial summary of the proposed law and otherwise meets statutory requirements.

The ballot summary impartially and accurately summarizes the ballot measure in 338 words with a readability score of 58, meeting all of the requirements of AS 15.45.180 and AS 15.80.005. The areas where sponsors claimed to have concerns with the petition summary that may still be present in the ballot summary focus mainly on the lieutenant governor's pointing out certain areas of ambiguity in the initiative.[27] It is appropriate for the lieutenant governor to give a completely objective and impartial summary that allows the public to decide whether to enact the law. This includes pointing out major policy choices that could be interpreted in vastly different ways once enacted; otherwise, the public could be misled if, in the end, the law is not implemented in the way the summary implies. Any disagreement on the part of sponsors can be properly characterized as an attempt to have the summary advocate and interpret the initiative language as the sponsors would prefer. The sponsors are free to do this in the

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[27] Sponsors also claimed language referencing the Public Records Act was improper. This claim is addressed in the next section.

supporting statement included in the election pamphlet.[28] But, the lieutenant governor has to act in a neutral manner based on the text of the initiative.

After determining that a petition has been properly certified, the lieutenant governor, with the assistance of the attorney general, must create a ballot summary that "give[s] a true and impartial summary of the proposed law."[29] The ballot title cannot exceed 25 words and the words in the summary cannot exceed "the product of the number of sections in the proposed law multiplied by 50."[30]

The Alaska Supreme Court has described the "basic purpose of the ballot summary" as enabling "voters to reach informed and intelligent decisions on how to cast their ballots—decisions free from any partisan suasion."[31] In achieving its purpose, "the summary must describe the main features of the measure and be complete enough to serve its purpose; and it must do so without being partisan, colored, argumentative, or in any way one-sided."[32] Although the summary need not recite every detail, it must disclose information that "would give the elector serious grounds for reflection."[33] The

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28 AS 15.58.020(a)(6)(E).

29 AS 15.45.180.

30 Id.

31 *Alaskans for Efficient Gov't., Inc. v. State*, 52 P.3d 732, 735 (Alaska 2002) (internal citations and quotations omitted).

32 *Id.* at 736.

33 *Id.*

burden is on "those attacking the summary to demonstrate that it is biased or misleading."[34]

In drafting a ballot summary for 19OGTX, the lieutenant governor had to grapple with how to address the lack of specific amendments and cross-references to the Alaska Statutes along with the addition of ambiguous terms in the initiative. The 19OGTX initiative, after Section 1 but before Section 2, has a bolded heading stating: "Notwithstanding Any Other Statutory Provisions to the Contrary, the Oil and Gas Production Tax in AS 43.55 Shall Be Amended as Follows:." Pl. Complaint, Ex. A at pp. 1. Following this broad heading, none of the subsequent sections attempt to amend specific oil and gas tax statutes, but instead, set forth new tax calculations to be placed on oil production that meets the factors in the applicability section. Pl. Complaint, Ex. B at pps. 1-2.

In total, the 19OGTX initiative is two pages with nine sections. Pl. Complaint, Ex. A. For comparison, HB 111 from 2017 that amended oil and gas tax credits was 26 pages with 47 sections.[35] Senate Bill 21 from 2013 that changed the oil and gas production tax was 30 pages with 38 sections.[36] And HB 2001 from 2008 that changed the oil and gas production tax was 57 pages with 77 sections.[37] This is not a

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[34] *Id.* at 735.

[35] Ch. 3 SSSLA 2017 (found at http://www.akleg.gov/PDF/30/Bills/HB0111Z.PDF).

[36] Ch. 10 SLA 2013 (found at http://www.akleg.gov/PDF/28/Bills/SB0021Z.PDF.)

[37] Ch. 1 SSSLA 2007 (found at http://www.akleg.gov/PDF/25/Bills/HB2001Z.PDF.)

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commentary on the policy of the initiative. It only highlights the lack of conforming amendments and the amount of ambiguity in the initiative bill, which leaves wide discretion on how it would be implemented. Instead of attempting to prescribe how implementation would occur, which would be inappropriate, the ballot summary points out the ambiguities and leaves it to the voter to decide whether those ambiguities are within a range the voter can live with and wants to see enacted.

For purposes of "describing the main features" and assisting voters in reaching "an informed and intelligent decision" on the ballot measure, the ballot summary cannot mislead voters by describing the ambiguous provisions as only being implemented in one way. Instead, the ballot summary needs to simply state, in a factual manner, that certain terms are not defined or specified. This is why the summary states in its description of what the new tax would apply to: "The new areas would be divided up based on 'fields, units, and nonunitized reservoirs' that meet the production threshold. The act does not define these terms." Ex. 2. And in the description of the new alleged "additional tax": "The act uses the term "additional tax" but it does not specify what the new tax is in addition to." Ex. 2. Both of these provisions represent major components of the initiative bill and must be included in the summary. However, both of these provisions lack clarity in exactly what they apply to and how they would apply. Presumably, this would be left to implementation by the Department of Revenue through regulation. Pointing out that terms are not defined or that a reference is lacking for what tax it would be added to does not create a bias one way or the other. Instead, it

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is simply a factual summary of the text of the initiative bill and ensures that voters are fully aware of what they are voting on.

Regardless of sponsors' desire to have the initiative bill implemented in the way they prefer, any court that ultimately must interpret the law will look to "materials that Alaska voters had available and would have relied upon to determine the scope and impact" along with looking at the plain language of the enacted laws.[38] The lieutenant governor's role is not to advocate for or against a specific future implementation of the ambiguous language, but to re-state in as readable a manner as possible what the initiative bill is proposing to do. The ballot summary here accomplishes this purpose and ensures all material information regarding 19OGTX is included.

For these reasons, the ballot summary complies with statutory requirements.

C. The ballot summary statement that the "normal Public Records Act process would apply" accurately and neutrally describes the scope and import of the proposed law.

The ballot summary states:

> The act would also make all filings and supporting information relating to the calculation and payment of the new taxes "a matter of public record". This would mean the normal Public Records Act process would apply.[39]" Ex. 2

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[38] *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 193 (Alaska 2007).

[39] The petition booklet summary included a phrase "and any information that needed to be withheld, for example for privacy or balance-of-interests reasons, would be withheld." Pl. Complaint, Ex. B at pp. 12. To the extent sponsors' arguments rest on the inclusion of this phrase, they must fail as moot since that phrase is not included in the ballot summary.

The reference to the Public Records Act, AS 40.25.100 – 40.25.295, is necessary because without the reference voters would be unable to seriously reflect on the scope and process by which the initiative could make certain taxpayer information subject to public disclosure.[40] The ballot summary language neutrally informs voters as to the statutes being implicitly amended by the initiative. Namely, certain confidential taxpayer information would be a public record and any disclosure of those records would depend on the procedures for disclosure of public records as provided in the Public Records Act, i.e. the normal process.

This ballot summary description and reference to the Public Records Act is particularly important here because the initiative did not include any express references to Alaska Statutes apart from a general reference to "AS 43.55." Nowhere in the initiative is the Public Records Act expressly amended or even cross-referenced. Instead, the initiative includes a statement that "Notwithstanding Any Other Statutory Provisions to the Contrary, the Oil and Gas Production Tax in AS 43.55 Shall Be Amended as Follows." Pl. Complaint, Ex. A. The initiative later declares "All filings and supporting information provided by each producer to the Department [of Revenue] relating to the calculation and payment of the taxes set forth in Sections 3 and 4 shall be a matter of public record." Pl. Complaint, Ex. A. The use of the "notwithstanding" clause in the initiative, when combined with the lack of any express cross-references to

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[40] *Pebble Ltd. P'ship ex rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064, 1082 (Alaska 2009).

the Public Records Act in the initiative sections amending AS 43.55, obscures the scope and import of the proposed law to voters unfamiliar with the law. The ballot summary language provides the necessary transparency for voters through the reference to the normal Public Records Act process.

With certain exceptions, AS 40.25.100(a)—a statute within the Public Records Act—declares that taxpayer information is confidential and not a public record.[41] This statute imposes an affirmative duty on the Department of Revenue to hold information confidential, unlike most other records held by state agencies.[42] The initiative would seek to transform some taxpayer information collected by the Department of Revenue into public records through a new implied exception to AS 40.25.100(a) created through the "notwithstanding" clause.[43] Alternatively, if the "notwithstanding" clause is ineffective as to any statutes outside of AS 43.55, then principles of statutory construction to read statutes harmoniously and give each word meaning would support

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41 *See, City of Kenai v. Kenai Peninsula News*, 642 P.2d 1316, 1320 n.13 (Alaska 1982) (the Alaska Statutes have included language similar to AS 40.25.100(a) since 1947).

42 *Compare,* AS 40.25.100(a) and AS 40.25.110(a) ("Unless specifically provided otherwise, the public records of all public agencies are open to inspection by the public... ").

43 *Nelson v. Progressive Cas. Ins. Co.*, 162 P.3d 1228, 1236 (Alaska 2007) (interpreting the phrase "notwithstanding any other provisions of law" to indicate that the section was an "exception to other potentially conflicting laws").

an implied exception in the initiative to AS 40.25.100(a).[44]

Regardless, sponsors appear to admit seeking an implied exception to AS 40.25.100(a). Pl. Complaint at ¶¶27 and 28. No bias can be reasonably read into the ballot summary for referencing the Public Records Act process when the sponsors acknowledge that the initiative seeks to change a statute within the Public Records Act. On the contrary, omission of a reference to the Public Records Act process could be considered a fatal flaw in the ballot summary given the importance of informing voters of changes to the Public Records Act and statutes implementing the constitutional right to privacy in Alaska.[45] These waters are "serious grounds for reflection" that must be disclosed in the ballot summary.[46]

The ballot summary would be misleading without any reference to the Public Records Act because voters might not know whether the Public Records Act process would apply. Also, voters might think *all* the detailed taxpayer information from the reporting and filing requirements for the new taxes in the initiative would *all* be publicly available. Indeed, sponsors argue that "[i]f a document is a matter of public record, confidential restrictions do not apply." Pl. Complaint at ¶27.

The Public Records Act does not mandate that all public records must be

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[44] *Pebble*, 215 P.3d at 1082 (requiring that a summary should be "complete enough to convey an intelligible idea of the scope and import of the proposed law" and "ought to be free from any misleading tendency, whether by of amplification, of omission, or of fallacy").

[45] AK Const. art. I, § 22.

[46] *Pebble*, 215 P.2d at 1082.

disclosed in their entirety as sponsors suggest. The Public Records Act in AS 40.25.120(a) provides a right to inspect public records with enumerated exceptions. The initiative would amend the statutory taxpayer confidential status of certain information. The initiative does not repeal or amend any exceptions listed in AS 40.25.120(a) nor can it change the constitutional right to privacy. Thus even if not confidential taxpayer information anymore, records required to be kept confidential under the constitution or another statute would not be disclosed. In short, the normal review process prior to disclosure would apply to taxpayer information made a public record by the initiative. This is important information for voters to know as they make a decision on whether to approve or reject the initiative.

Additionally, the inclusion of the reference to the normal Public Records Act process in the ballot summary might alleviate constitutional concerns that voters might have. In *Pebble*, the Department of Law interpreted "effect" in an initiative to mean "adversely effect" for the ballot summary because to interpret the initiative to mean *any* effect would have invalidated the initiative on constitutional grounds.[47] Similarly, the interpretation in the ballot summary that the normal Public Records Act process would apply supports a constitutional construction of the initiative.

In *State, Department of Revenue v. Oliver*, the Court concluded "that the Department of Revenue, in its information-gathering activities, must demonstrate a due

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[47] 215 P.2d at 1077.

regard for individuals' privacy rights.[48]" Given the obscure drafting style of the initiative, the inclusion of the reference to the normal Public Records Act process in the ballot summary supports a construction of the initiative consistent with the Department of Revenue's constitutional obligations and any other laws that might apply prior to public disclosure. Sponsors suggestion in the complaint to remove the reference to the Public Records Act and simply leave the interpretation for later litigation is simply a matter of policy disagreement and does not constitute legal grounds to change the ballot summary. As noted above, omission of the reference could be detrimental to the voters and call the ballot summary into question for being misleading. Additionally, the inclusion of the word "adversely" in the *Pebble* ballot summary and the Court's favorable view of that inclusion support that it is appropriate for ballot summaries to include some straight forward interpretation that ensures the ballot measure is harmonized with existing statutes and the Alaska Constitution.[49] For these reasons, the ballot summary language with respect to the Public Records Act should be upheld.

V. CONCLUSION

Sponsors should not be allowed to circumvent the normal initiative process by filing a complaint challenging the petition summary and using that as a vehicle to challenge the ballot summary after the 30-day deadline has expired. These are two different requirements, as evidenced in this case by the different language in the ballot

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48 636 P.2d 1156, 1168 (Alaska 1981).

49 215 P.2d at 1076-77.

summary. Therefore, sponsors' complaint should be dismissed as untimely.

The State also wins on the merits. The ballot summary only includes accurate information that is aimed at assisting voters in an impartial manner to make an informed decision on whether to approve or reject the ballot measure. Pointing out areas of ambiguity and informing the public of the process that will be followed to obtain the public tax records are all true and correct statements that are not misleading or biased. Therefore, summary judgment should be granted in favor of the State.

DATED May 1, 2020.

KEVIN G. CLARKSON
ATTORNEY GENERAL

By: /s Cori Mills/
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Subject: 3AN-19-11106 CI - Defendants' Motion for Summary Judgment and supporting documents
Date: 5/1/2020 8:51:03 AM

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

VOTE YES FOR ALASKA'S FAIR SHARE,

Plaintiff,

v.

KEVIN MEYER, LIEUTENANT GOVERNOR OF THE STATE OF ALASKA, and STATE OF ALASKA, DIVISION OF ELECTIONS,

Defendants.

Case No. 3AN-19-11106 CI

FILED in the TRIAL COURTS
STATE OF ALASKA, THIRD DISTRICT

MAY 01 2020

Clerk of the Trial Courts
By _____ Deputy

#1

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants move this Court for summary judgment against the Plaintiff on all claims in their complaint pursuant to Alaska Civil Rule 56. Defendants are entitled to summary judgment in their favor as there are no genuine issues of material fact on Defendants' arguments and Defendants are entitled to judgment as a matter of law. The claims in Plaintiff's Complaint are moot, time-barred, and lack merit. The motion is supported by the accompanying memorandum, affidavit of Cori M. Mills, exhibits, and a proposed order.

DATED: May 1, 2020.

KEVIN G. CLARKSON
ATTORNEY GENERAL

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Alaska Division of Elections

Initiative Petition List

Petition ID:	**19OGTX**
Petition Status:	Petition Properly Filed
Petition Application Title:	An Act relating to the oil and gas production tax, tax payments, and tax credits
Primary Sponsors:	Robin Brena, Jane R Angvik and R Merrick Peirce
Contact Sponsor:	Robin Brena – 810 N St Ste. 100, Anchorage AK 99501
Petition Application Filed:	August 16, 2019
Sponsors Proposed Bill Language:	An Act relating to the oil and gas production tax, tax payments, and tax credits.
Petition Application Review Deadline:	October 15, 2019
Petition Application:	Application Certified - October 15,2019 Application Certification Letter Application Signature Review Attorney General Opinion: AGO No. Statement of Costs
Petition Booklets Issued:	October 23, 2019
Petition Booklets Filing Deadline:	October 21, 2020
Petition Filed With Elections:	January 17, 2020
Petition Notice of Proper or Improper Filing:	Letter To Primary Sponsor Final Petition Summary Report
Proposed Ballot Title and Summary:	Proposed Ballot Summary and Title

Petition ID:	**19SEBR**

Lieutenant Governor Kevin Meyer
STATE OF ALASKA

March 17, 2020

Robin O. Brena
810 N Street, Suite 100
Anchorage, AK 99501

Re: 19OGTX – Fair Share Initiative

Mr. Brena:

I have reviewed your petition for the initiative entitled "An Act changing the oil and gas production tax for certain fields, units, and nonunitized reservoirs on the North Slope" and have determined that the petition was properly filed. My notice of proper filing is enclosed. Specifically, the petition was signed by qualified voters from all 40 house districts equal in number to at least 10 percent of those who voted in the preceding general election; with signatures from at least 30 house districts matching or exceeding seven percent of those who voted in the preceding general election in the house district. The Division of Elections verified 39,174 voter signatures, which exceeds the 28,501 signature requirement based on the 2018 general election. A copy of the Petition Statistics Report prepared by the Division of Elections is enclosed.

With the assistance of the attorney general, I have prepared the following ballot title and proposition that meets the requirements of AS 15.45.180:

An Act changing the oil and gas production tax for certain fields, units, and nonunitized reservoirs on the North Slope

This act would change the oil and gas production tax for areas of the North Slope where a company produced more than 40,000 barrels of oil per day in the prior year and more than 400 million barrels total. The new areas would be divided up based on "fields, units, and nonunitized reservoirs" that meet the production threshold. The act does not define these terms. For any areas that meet the production threshold, the tax would be the greater of one of two new taxes.

(1) One tax would be a tax on the gross value at the point of production of the oil at a rate of 10% when oil is less than $50 per-barrel. This tax would increase to a maximum of 15% when oil is $70 per-barrel or higher. No deductions could take the tax below the 10% to 15% floor.

(2) The other tax, termed an "additional tax," would be based on a calculation of a production tax value for the oil that would allow lease expenditure and transportation cost deductions. This tax on production tax value would be calculated based on the difference between the production tax value of the oil and $50. The difference between the two would be multiplied by the volume of oil, and then that amount would be multiplied by 15%. The existing per-taxable-barrel credit would not apply. The act uses the term "additional tax" but it does not specify what the new tax is in addition to.

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The tax would be calculated for each field, unit, or nonunitized reservoir on a monthly basis. Taxes are currently calculated on an annual basis, with monthly estimated payments. Since these new taxes would only apply to certain areas, a taxpayer would still have to submit annual taxes for the areas where the new taxes do not apply.

The act would also make all filings and supporting information relating to the calculation and payment of the new taxes "a matter of public record." This would mean the normal Public Records Act process would apply.

Should this initiative become law?

This ballot proposition will appear on the election ballot of the first statewide general, special, or primary election that is held after (1) the petition has been filed; (2) a legislative session has convened and adjourned; and (3) a period of 120 days has expired since the adjournment of the legislative session. Barring an unforeseen special election or adjournment of the current legislative session occurring on or before April 19, 2020, this proposition will be scheduled to appear on the general election ballot on the November 3, 2020 general election. If a majority of the votes cast on the initiative proposition favor its adoption, I shall so certify and the proposed law will be enacted. The act becomes effective 90 days after certification.

Please be advised that under AS 15.45.210, this petition will be void if I, with the formal concurrence of the attorney general, determine that an act of the legislature that is substantially the same as the proposed law was enacted after the petition has been filed and before the date of the election. I will advise you in writing of my determination in this matter.

Please be advised that under AS 15.45.240, any person aggrieved by my determination set out in this letter may bring an action in the superior court to have the determination reversed within 30 days of the date on which notice of the determination was given.

If you have questions or comments about the ongoing initiative process, please contact my staff, April Simpson, at (907) 465-4081.

Sincerely,

Kevin Meyer
Lieutenant Governor

Enclosures

cc: Kevin G. Clarkson, Attorney General
Gail Fenumiai, Director of Elections

Lieutenant Governor Kevin Meyer
STATE OF ALASKA

NOTICE OF PROPER FILING

I, KEVIN MEYER, LIEUTENANT GOVERNOR FOR THE STATE OF ALASKA, under the provisions of Article XI of the Constitution of the State of Alaska and under the provisions of AS 15.45, hereby provide notice that the initiative petition for "An Act changing the oil and gas production tax for certain fields, units, and nonunitized reservoirs on the North Slope" which was received on August 16, 2019, and known as 19OGTX, was properly filed.

I have determined that the initiative sponsors have timely filed the petition and that the petition is signed by qualified voters (1) equal in number to 10 percent of those who voted in the preceding general election; (2) resident in at least three-fourths of the house districts in the state; and (3) who, in each of the house districts, are equal in number to at least seven percent of those who voted in the preceding general election in the house district.

In accordance with AS 15.45.190, the Director of the Division of Elections shall place the ballot title and proposition on the election ballot of the first statewide general, special, or primary election that is held after a period of 120 days has expired since the adjournment of the legislative session. Barring any unforeseen special election or adjournment of the current legislative session on or before April 19, 2020, this proposition is scheduled to appear on the general election ballot on the November 3, 2020 general election.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed hereto the Seal of the State of Alaska, at Juneau, Alaska,

This 17th day of March, 2020.

Kevin Meyer

KEVIN MEYER, LIEUTENANT GOVERNOR

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Exhibit 3 attached to the Affidavit of Cori M. Mills
Comparison of Petition Summary and Ballot Summary

*Language that is struck out (e.g., ~~delete~~) was not included in the ballot summary, and language that is bolded and underlined (e.g., **added**) was added in the ballot summary.*

An Act changing the oil and gas production tax for certain fields, units, and nonunitized reservoirs on the North Slope

This act would change the oil and gas production tax for areas of the North Slope where ~~the~~ **a** company produced more than 40,000 barrels of oil per day in the prior year and~~/or~~ more than 400 million barrels total. ~~It is unclear whether the area has to meet both the 40,000 and 400,000 million thresholds or just one of them.~~ The new areas would be divided up based on "fields, units, and nonunitized reservoirs" that meet the production threshold. The Act does not define **these terms** ~~what a field or unit is~~. For any areas that meet the production threshold, the tax would be the greater of one of two new taxes.

(1) One tax would be a tax on the gross value at the point of production of the oil at a rate of 10% when oil is less than $50 per-barrel. This tax would increase to a maximum of 15% when oil is $70 per-barrel or higher. No deductions could take the tax below the 10% to 15% floor.

(2) The other tax**, termed an "additional tax,"** would be based on a calculation of a production tax value for the oil that would allow lease expenditure and transportation cost deductions. This tax on production tax value would be calculated based on the difference between the production tax value of the oil and $50. The difference between the two would be multiplied by the volume of oil, and then that amount would be multiplied by 15%. The existing per-taxable-barrel credit would not apply. The Act uses the term "additional tax" but it does not ~~designate~~ **specify** what **the new** tax is in addition to. ~~The result is that this tax would likely always be less than the tax above.~~

~~The Department of Revenue would calculate the~~ **The** tax **would be calculated** for each field, unit, or nonunitized reservoir on a monthly basis. Taxes are currently calculated on an annual basis, with monthly estimated payments. Since these new taxes would only apply to certain areas, a taxpayer would still have to submit annual taxes for the areas where the new taxes do not apply.

The Act would also make all ~~tax documents~~ **filing and supporting information** relating to the calculation and payment of the new taxes "a matter of public record." This would mean the ~~documents would be reviewed under the~~ normal Public Records Act process **would apply**. ~~and any information that needed to be withheld, for example for privacy or balance-of-interests reasons, would be withheld.~~

Should this initiative become law?

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Attorneys for Plaintiff

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

VOTE YES FOR ALASKA'S FAIR SHARE,

Plaintiff,

v.

KEVIN MEYER, LIEUTENANT GOVERNOR OF THE STATE OF ALASKA, and STATE OF ALASKA, DIVISION OF ELECTIONS,

Defendants.

Case No. 3AN-19-11106 CI

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This case arises out of the determination of Lieutenant Governor Kevin Meyer ("Meyer") to use a summary of Plaintiff Vote Yes for Alaska's Fair Share's ("Fair Share")

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properly submitted and certified initiative 19OGTX ("Fair Share Act")[1] that is not true and impartial as required by Alaska law.

The summary by Meyer, which was subsequently printed in the signature booklets ("First Summary"), was the one recommended on pages 11-12 of Attorney General Opinion No. 2019200671 (October 14, 2019) ("AGO").[2] The First Summary was clearly intended to be the only summary prepared and was to be used for the signature booklets and the ballot.[3] The First Summary both misrepresents and misinterprets the provisions of the Fair Share Act, offering improper and speculative opinions on the clarity and meaning of its terms and portraying them as confusing or meaningless.

As a result of the obvious flaws to the First Summary, counsel for Fair Share attempted to contact counsel for Meyer to discuss the First Summary and forwarded a redline version of the First Summary for consideration. Counsel for Meyer responded by refusing to discuss the

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1 Exhibit A, provisions of the Fair Share Act.

2 Exhibit B, AGO at 12.

3 Exhibit B, AGO at 11 ("We have prepared a ballot-ready petition title and summary to assist you in complying with AS 15.45.090(2) and AS 15.45.180, as is our office's standard practice. Under AS 15.45.180, a ballot proposition must include a "true and impartial summary of the proposed law."). Clearly, the First Summary was intended to be the summary used for the ballot and expressly stated this truth and referred specifically to AS 15.45.180, which, of course, is the statute providing direction for the summary to be placed on the ballot. To the contrary of this clear language and intention, Meyer has inexplicably taken the position in his Answer that the First Summary was only intended for the signature booklets.

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First Summary altogether and stated that, absent litigation, there would be no discussion.[4] As a result, this action was initiated by Fair Share.

After this action was initiated and the petition signatures were reviewed and accepted, opposing counsel were finally able to discuss the flaws in the First Summary. Again, counsel for Fair Share sent a redline version of the First Summary correcting the flaws for consideration by Defendant Meyer. To his credit, Defendant Meyer conceded and corrected two of the three problems suggested by Fair Share. Defendant Meyer subsequently sent a letter dated March 17, 2020, with an amended version of the First Summary for use on the ballot ("Second Summary").[5]

While the Second Summary corrects two of the three problems described in Fair Share' s Complaint, the Second Summary continues to misconstrue Section 7, Public Records, of the Fair Share Act ("Section 7"). Defendant Meyer has obfuscated the plain text and intent of Section 7, thereby impairing the opportunity for the citizens of Alaska to lawfully exercise their right to enact laws by initiative guaranteed by Article XI, Section 1, of the Alaska Constitution.

Section 1 of the Fair Share Act provides, "Notwithstanding Any Other Statutory Provisions to the Contrary, the Oil and Gas Production Tax in AS 43.55 Shall Be Amended as Follows:". In turn, Section 7 provides, "All filings and supporting information provided by each producer to the Department relating to the calculation and payment of the taxes set forth in Sections 3 and 4 shall be a matter of public record."

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4 Exhibit C, Email from Mills to Brena (October 21, 2019).
5 Exhibit D, Second Summary of 19OGTX (March 17, 2020).

Section 7 simply requires that production tax filings under the Fair Share Act "shall be a matter of public record." In the Second Summary, as in the First Summary, Defendant Meyer does not pretend to summarize the language of Section 7 in a true and impartial manner. Instead, he interposes the least-credible legal interpretation possible when he states, "This would mean the normal Public Records Act process would apply."[6] This biased interpretation of Section 7 that Defendant Meyer offers as a summary means, in the words of the AGO, "most, if not all, of the tax documents" would remain confidential[7]—the exact opposite of its plain meaning, the obvious intent of the language, the publicly stated intentions of the drafters, and the AGO's own acknowledgment of the drafter's intention. Far from being a true and fair summary of Section 7, Defendant Meyer's interpretative sentence would render Section 7 meaningless.

This is the only remaining issue for this Court to resolve. Defendant Meyer's biased interpretative sentence concerning Section 7 should be removed.[8] If Defendant Meyer were to agree or this Court were to order the removal of this single sentence, this legal action could end. Fair Share has been aggrieved by being forced to bring a legal action to have the many obvious flaws in the First Summary corrected and by Defendant Meyer's continuing determination not to fairly and impartially summarize Section 7 in the Second Summary. As a result, Fair Share respectfully requests that this Court grant summary judgment in its favor so

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6 Exhibit D, Second Summary at 2.
7 Exhibit B, AGO at 6.
8 n.6 *supra.*

the summary language presented to the Alaskan voters will include a true and impartial summary of Section 7.

STATEMENT OF FACTS

Fair Share filed its petition application on August 16, 2019. Under AS 15.45.080, Defendant Meyer could deny certification of the application only if he determined "(1) the proposed bill to be initiated is not confined to one subject or is otherwise not in the required form; (2) the application is not substantially in the required form; or (3) there is an insufficient number of qualified sponsors." Meyer made no such determination and certified the application on October 15, 2019.

Under AS 15.45.090, Defendant Meyer was required to prepare "an impartial summary of the subject matter of the act." The Attorney General prepared the First Summary and stated it was "a ballot-ready petition title and summary to assist [Defendant Meyer] in complying with AS 15.45.090(2) and AS 15.45.180, as is our office's standard practice."[9] AS 15.45.180 requires Defendant Meyer to prepare a ballot title and proposition with the assistance of the attorney general, which "shall give a true and impartial summary of the proposed law." Defendant Meyer used the First Summary and printed it on the petition booklets and clearly intended to use it for the ballot prior to this action being filed.

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[9] Exhibit B, AGO at 11.

It was only after Fair Share brought this legal action that Defendant Meyer changed his position and took the position in his Answer that "the lieutenant governor has taken no action to create a ballot summary."[10] Presumably, Defendant Meyer's new position was to give him the opportunity to correct some of the obvious flaws in the First Summary. This change of position is ironic given counsel for Defendant Meyer refused to consider or even discuss those same flaws with counsel for Fair Share prior to the initiation of this legal action. As a result, Fair Share was forced to bring this action on November 14, 2019, as required under AS 15.45.240.

In meeting and conferring on February 26, 2020, per the pre-trial order, Fair Share again offered revisions to Defendants to correct the problems in the First Summary. On March 17, 2020, Defendant Meyer issued the Second Summary, which concedes and corrects two of the three issues in Fair Share's Complaint but persists in misrepresenting Section 7 of the Fair Share Act, which requires production tax filings be a matter of public record.[11]

LEGAL STANDARDS

Civil Rule 56 provides that summary judgment shall be entered in favor of the moving party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together

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[10] Exhibit E, Answer at 2 (February 10, 2020).

[11] Specifically, the Second Summary corrects the inaccurate statement regarding the Fair Share's application as described in paragraphs 17-19 of the Complaint, substantially corrects the inaccurate interpretation of the tax under Section 4(b) of the Fair Share Act tax as described in paragraphs 24-25 of the Complaint, but persists in construing Section 7's plain requirement for tax filings to become a matter of public record to be meaningless.

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with affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law."[12] To succeed on summary judgment, a movant must show that there are no genuine issues of material fact, and the movant is entitled to judgment as a matter of law.[13] In determining whether there is a genuine issue of material fact, "[a]ll reasonable inferences of fact from proffered materials must be drawn against the moving party . . . and in favor of the non-moving party."[14] Once the moving party meets its burden of establishing the absence of any material facts, the non-moving party must set forth specific facts showing that it could produce evidence "reasonably tending to dispute or contradict the movant' s evidence and thus demonstrate that a material issue of facts exists."[15] Mere assertions of fact in pleadings and memoranda are insufficient to deny summary judgment.[16]

To amend a summary, the Alaska courts must reasonably determine the summary is not "impartial and accurate."[17] Those opposed to the summary must "demonstrate that it is biased

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12 Alaska R. Civ. P. 56(c).
13 *Zeman v. Lufthansa German Airlines*, 699 P.2d 1274, 1280 (Alaska 1985).
14 *Sea Lion Corp. v. Air Logistics of Alaska*, Inc., 787 P.2d 109, 116 (Alaska 1990).
15 *State of Alaska, Dep't of Highways v. Green*, 586 P.2d 595, 606 n.32 (Alaska 1978).
16 *Brock v. Rogers & Babler*, Inc., 536 P.2d 778, 783 (Alaska 1975).
17 *Planned Parenthood of Alaska v. Campbell*, 232 P.3d 725, 729 (Alaska 2010) (quoting *Alaskans for Efficient Gov't, Inc. v. State*, 52 P.3d 732, 735 (Alaska 2002)).

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or misleading.'"[18] Courts apply their "independent judgment to questions of law, adopting 'the rule of law most persuasive in light of precedent, reason, and policy.'"[19]

ARGUMENT

I. THE SUMMARY MUST BE PROTECTED FROM BIAS

The Fair Share Act amends the current oil production tax system put in place through Senate Bill 21[20] to transparently increase Alaskans' fair share of the oil revenues from the sale of our oil from the three largest and most profitable oil fields owned by the State of Alaska—the Prudhoe Bay Unit, the Kuparuk River Unit, and the Colville River Unit.[21] The Fair Share Act will increase Alaskans' share by increasing production taxes by roughly $1 billion per year.

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[18] *Planned Parenthood*, 232 P.3d at 729 (quoting *Pebble Ltd. P'ship*, 215 P.3d 1064, 1083 (Alaska 2009).

[19] *Planned Parenthood*, 232 P.3d at 729 (quoting *Jacob v. State, Dep't of Health & Soc. Servs.*, 177 P.3d 1181, 1184 (Alaska 2008)).

[20] Senate Bill 21 was a bill entitled, *"An Act relating to the interest rate applicable to certain amounts due for fees, taxes, and payments made and property delivered to the Department of Revenue; relating to appropriations from taxes paid under the Alaska Net Income Tax Act; providing a tax credit against the corporation income tax for qualified oil and gas service industry expenditures; relating to the oil and gas production tax rate; relating to gas used in the state; relating to monthly installment payments of the oil and gas production tax; relating to oil and gas production tax credits for certain losses and expenditures; relating to oil and gas production tax credit certificates; relating to nontransferable tax credits based on production; relating to the oil and gas tax credit fund; relating to annual statements by producers and explorers; establishing an Oil and Gas Competitiveness Review Board; relating to the determination of annual oil and gas production tax value including adjustments based on a percentage of gross value at the point of production from certain leases or properties; and making conforming amendments."* which became effective January 1, 2014.

[21] These three units on the North Slope are often referred to within the oil industry simply by the name of the largest field within each individual unit: the Prudhoe Bay Unit is often referred

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The Fair Share Act was only made necessary because of the massive production tax reductions under Senate Bill 21. For the five fiscal years *before* Senate Bill 21 became law, the State of Alaska recovered $19,000,000,000 under the production tax (after credits). For the five fiscal years *after* Senate Bill 21 became law, the State of Alaska recovered less than $0 (after credits), and the State still owes hundreds of millions of dollars of unpaid credits it is seeking financing to pay.[22] For helpful background on the structure and policies of the Fair Share Act, exhibits are attached for this Court's convenience on the summary of the Fair Share Act on Fair Share's webpage,[23] Frequently Asked Questions on Fair Share's webpage, and two articles by one of its principal drafters explaining the Fair Share Act's structure and policies.[24]

It would be difficult to overstate the political power and influence of the major international oil producers and their surrogates over matters relating to production taxes and the confidentiality of their revenues, costs, and profits from producing oil in Alaska. As recently as a few months ago, Justice Ginsberg in a concurring statement to a *pro curium*

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to as Prudhoe Bay, the Kuparuk River Unit is often referred to as Kuparuk, and the Colville River Unit is often referred to as Alpine.

[22] 2019 State Revenue Sources Book-Appendix 3A at 89 and Chapter 8, Section 2 at 63 for 2010-2016 data (http://tax.alaska.gov/programs/documentviewer/viewer.aspx?1573r); 2018 State Revenue Sources Book Appendix 3A for 2009 data (http://tax.alaska.gov/programs/documentviewer/viewer.aspx?1532r); and annual reports on petroleum credits from the Department of Revenue for 2017-2019 data (http://tax.alaska.gov/programs/programs/reports/index.aspx?60650).

[23] https://voteyesforalaskasfairshare.com/summary/

[24] Exhibit F, FAQs from website; Exhibit G, website article 1 by Robin Brena (Oct. 24, 2016); and Exhibit H, website article 2 by Robin Brena (March 20, 2017).

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decision by the United States Supreme Court noted the political power and influence in Alaska of these major producers and suggested their power and influence may represent a "special justification" for maintaining low campaign contribution limits in Alaska. Justice Ginsberg stated, "Moreover, Alaska has the second smallest legislature in the country and derives approximately 90 percent of its revenues from one economic sector—the oil and gas industry. As the District Court suggested, these characteristics make Alaska "highly, if not uniquely, vulnerable to corruption in politics and government. *Thompson v. Dauphinais*, 217 F. Supp. 3d 1023, 1029 (Alaska 2016)."[25]

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[25] *Thompson v. Hebdon*, Per Curiam No. 19-122 (Nov. 25, 2019). In *Thompson v. Dauphinais*, 217 F. Supp. 3d 1023, 1029 (Alaska 2016), the Federal District Court, Judge Burgess, held, "the State put forward evidence that the risk of quid pro quo corruption or its appearance in Alaska politics and government is both actual and considerable." In making this ruling, Judge Burgess noted, Dr. Gerald McBeath's, a Professor Emeritus of Political Science at the University of Alaska Fairbanks, explanation at trial of "Alaska's almost complete reliance on" the oil industry and "just ten votes can stop a legislative action such as an oil or gas tax increase from becoming law." *Id.* Judge Burgess also noted the testimony of several prominent experts and political figures including Mr. Bob Bell who "testified that . . . an oil executive offered to hold a fundraiser for him if he would publicly support" a particular political position, and when Mr. Bell refused, "the oil executive held a fundraiser for his opponent instead." *Id.* Judge Burgess also noted, "the widely publicized VECO public corruption scandal, in which approximately ten percent of the Alaska Legislature, including state representatives Vic Kohring, Pete Kott, and Beverly Masek, were directly implicated for accepting money from Bill Allen and VECO, Allen's oilfield services firm, in exchange for votes and other political favors" largely associated with production "oil tax legislation that was then pending before the Alaska Legislature." *Id.* Finally, Judge Burgess noted a Government Ethics Center study commissioned by the Alaska State Senate in 1990 in which the Government Ethics Center surveyed Alaska legislators, public officials, and lobbyists which revealed that "24 percent of lobbyists surveyed believed that `about half' or more of Alaska's legislators could `be influenced to take or withhold some significant legislative action . . . by campaign contributions or other financial benefits provided by lobbyists and their employers.'" *Id.*

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Perhaps the zenith of the major international oil producers' political power and influence over production tax policies was revealed through the passage of Senate Bill 21—which the Fair Share Act seeks to amend. Senate Bill 21 passed the Alaska Senate by a single vote but only after a roughly $14 million lobbying effort funded by the major international producers. Among the Senators voting in favor of Senate Bill 21 were two employees of ConocoPhillips, *Defendant Meyer* and Senator Micciche, and the spouse of a businessman with deep economic ties to those producers, current Senate President Giessel.[26] Subsequent to enactment, Senate Bill 21 narrowly avoided complete repeal by Alaskan voters but only after *another* $15 million campaign effort, again funded by the major producers. Given the political power and influence of the major international producers over the legislative and political process in Alaska, direct democracy through an initiative has become the only meaningful political mechanism to have a meaningful conversation about, much less improve, the unfortunate oil tax policies enacted through Senate Bill 21.

Fair Share offers this context to explain why this Court's protection of the initiative process underlying the Fair Share Act is important. A true and impartial summary should be entirely free of the political influence and power of the major international oil producers, as well as free of Defendant Meyer's well-known biases in favor of Senate Bill 21 (in which he was central to passing), against Alaskans receiving an increased share of the oil revenues, and against greater transparency as to the impact of our oil tax policies.

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[26] Exhibit I, Anchorage Daily News article "ConocoPhillips employees steer Alaska oil tax cut bill through Legislature" (Sept. 27, 2016).

The Alaska Supreme Court has long held that "[i]n reviewing an initiative prior to submission to the people, the requirements of the constitutional and statutory provisions pertaining to the use of initiatives should be liberally construed so that 'the people (are) permitted to vote and express their will on the proposed legislation . . . [thus] all doubts as to technical deficiencies or failure to comply with the exact letter of procedure will be resolved in favor of the accomplishment of that purpose.'"[27]

The Alaska Supreme Court has also long held that an initiative should be "presented clearly and honestly to the people of Alaska."[28] To achieve this, a summary of the proposed law must be "'a fair, concise, true and impartial statement of the intent of the proposed measure,'"[29] "'free from any misleading tendency, whether of amplification, of omission, or of fallacy, and . . . must contain no partisan coloring.'"[30] In emphasizing "the important right of the people to enact laws by initiative," the Alaska Supreme Court has recognized that the "theory of initiative legislation [is] based upon the security that the legislation proposed and

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27 *Boucher v. Engstrom*, 528 P.2d 456, 462 (Alaska 1974) (citations omitted).

28 *Planned Parenthood*, 232 P.3d at 731 (quoting *Faipeas v. Municipality of Anchorage*, 860 P.2d 1214, 1221 (Alaska 1993)).

29 *Planned Parenthood*, 232 P.3d at 731 (quoting *Burgess v. Alaska Lieutenant Governor*, 654 P.2d 273, 275 (Alaska 1982)).

30 *Planned Parenthood*, 232 P.3d at 731 (quoting *Pebble Ltd. P'ship ex. rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064, 1083 (Alaska 2009)).

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petitioned for by the people shall be voted upon at the polls by them without interference, revision, or mutilation by any official or set of officials[.]"[31]

As a constitutional exercise in direct democracy by the electorate, the initiative process limits state officials to constitutionally prescribed roles in the initiative process. Defendant Meyer's biases, conjecture, or legal opinions as to the meaning of the provisions of the Fair Share Act have no place in a "true and impartial summary." Subject to few exceptions not relevant to this action, the pre-election review of a law proposed by initiative is not permitted. As the Alaska Supreme Court has held, "[t]he rule against pre-election review is a prudential one, steeped in traditional policies recognizing the need . . . to uphold the people's right to initiate laws directly, and to check the power of individual officials to keep the electorate's voice from being heard."[32]

Thus, by constitutional design, the initiative process does not permit Defendant Meyer and other state officials to shape the electorate's perception of the Fair Share Act through introjecting their own biases, interpretations, and opinions in the "true and impartial summary" or otherwise. Defendant Meyer has one simple and constitutionally limited role at this juncture of the initiative process—to summarize the Fair Share Act in a true and impartial manner. And,

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[31] *McAlpine v. University of Alaska*, 762 P.2d 81, 93 (Alaska 1988) (quoting *Bennett v. Drullard*, 27 Cal.App. 180, 149 P. 368 (Cal. App. 1915)). The Court disagreed with *Bennett* in holding that "circumspect judicial exercise of the power to sever impermissible portions of initiatives will promote, rather than frustrate" the constitutional right and practical recourse of the sponsors. *Id.*

[32] *Alaskans for Efficient Government, Inc. v. State*, 153 P.3d 296, 298 (Alaska 2007).

in that singular, limited role, he has fallen short by choosing to offer a biased interpretation of Section 7 rather than a true and impartial summary.

Finally, a proposed law through initiative is directly from the electorate and should be written in simple and direct terms. There is no legal requirement that a proposed law under the initiative process be drafted in the technical and clumsy form used by the Legislature in enacting legislation. The Fair Share Act is two pages long, simply written, and direct in its language.[33]

To avoid any possible confusion over exactly how the Fair Share Act proposed to amend AS 43.55, Fair Share worked with Legislative Legal and Senator Wielechowski to introduce Senate Bill 129 which is "substantially similar" to the Fair Share Act bill but in the technically correct form used by the Legislature.[34] To the degree this Court needs guidance as to the drafters' intentions with regard to any Section of the Fair Share Act, Senate Bill 129 is a

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[33] This Court should note that the Summaries used by Defendant Meyer and the speculative comments in the AGO often wrongly assume the form of the Fair Share Act should be more detailed and technical in nature. Fair Share does not agree, and no such legal requirement exists nor should it be imposed by any state official or court.

[34] Exhibit J, Senate Bill 129 titled, *"An Act relating to the oil and gas production tax; relating to credits against the oil and gas production tax; relating to payments of oil and gas production tax; relating to lease expenditures and adjustments to lease expenditures, making public certain information related to the oil and gas production tax; relating to the Department of Revenue; and providing for an effective date."*

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technically correct and substantially similar bill intended to operationalize the Fair Share Act in the longer and more technical form used by the Legislature.[35]

II. THE SUMMARIES ARE NOT TRUE AND IMPARTIAL

By definition, a "summary" is "an abstract, abridgment, or compendium especially of a preceding discourse."[36] Instead of meeting the definition of a true and impartial summary, Defendant Meyer's Summaries are biased and misleading in several respects, and the AGO underlying them is replete with interpretation, speculation, critique, and other unnecessary commentary far beyond the bounds of the four basic requirements to be evaluated under AS 15.45.040. Taken together, the Summaries and the AGO evidence a determined bias to misunderstand and misrepresent the Fair Share Act rather than to offer a true and impartial summary.

A. The First Summary Is Biased and Misleading in Suggesting Confusion on the Plain Term "and" as Well as on the Quantity Thresholds for Applicability in the Fair Share Act, and the Second Summary Concedes this Point.

Section 2 (Applicability) of the Fair Share Act ("Section 2") states that its provisions "only apply to oil produced from fields, units, and nonunitized reservoirs north of 68 degrees north latitude that have produced in excess of 40,000 barrels of oil per day in the previous calendar year *and* in excess of 400,000,000 barrels of total cumulative oil production"

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[35] As expected by Fair Share, the Legislature has refused to even permit Senate Bill 129 to be heard by the committees to which it has been referred, Senate Resources or Senate Finance.
[36] Merriam-Webster on-line dictionary.

(emphasis added).[37] The use of the conjunctive term "and" in the applicability section of the Fair Share Act makes clear both production thresholds must be met before its provisions apply.[38]

In contrast, the First Summary's description of Section 2 states that "[t]his act would change the oil and gas production tax for areas of the North Slope where the company produced more than 40,000 barrels of oil per day in the prior year *and/or* more than 400 million barrels total. *It is unclear whether the area has to meet both the 40,000 and 400,000 million thresholds or just one of them*" (emphasis added).[39]

The First Summary's description of Section 2 is not a true and impartial description because it incorrectly describes the conjunctive term "and" to mean its opposite, the disjunctive term "or," or something quite different, the combined terms "and/or." The Fair Share Act expressly states its terms "only apply" to areas in which the annual per barrel production threshold "and" the total cumulative production threshold are met. The First Summary's use of "and/or" rather than "and" dramatically changes the meaning and applicability of the Fair Share Act by applying it to production from many more fields than the plain language of Section 2 provides. Defendant Meyer's use of the disjunctive "or" as a summary of the

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37 Exhibit A, provisions of the Fair Share Act.
38 Exhibit A, provisions of the Fair Share Act.
39 Exhibit B, AGO at 12.

conjunctive "and" in Section 2 suggests a biased indifference to his duty to provide a true and impartial summary to Alaskan voters.[40]

Similarly, the First Summary's description of Section 2 is not a true and impartial description because it incorrectly summarizes "400,000,000" barrels" as "400,000 million" barrels. The First Summary's use of "400,000" million barrels rather than "400,000,000" barrels again dramatically changes the meaning and applicability of the Fair Share Act by making the second threshold 1,000 greater than the plain language of Section 2. In fact, the First Summary's use of "400,000" million as a summary of the second applicability threshold would mean the Fair Share Act would never apply to any production whatsoever since the total production from every North Slope oil field to date has been less than 20,000 million barrels or five percent of the "400,000" million barrels used in the First Summary. Defendant Meyer's use of the "400,000" million barrels as a summary of "400,000,000" barrels also suggests at best a biased indifference to his duty to provide a true and impartial summary to Alaskan voters.[41]

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[40] In this regard, Fair Share notes that the guide to legislative drafting prohibits use of the phrase and/or: "Do not use "and/or" because it is too ambiguous." Manual of Legislative Drafting, Legislative Affairs Agency at 60 (2019 ed.).

[41] Exhibit E, Answer at 4 ("The defendants admit the petition summary includes a typo where it should say 400 million instead of 400,000 million."). Defendant Meyer's characterization of his mistake as a "typo" would be more credible if not for his refusal to correct it or discuss it even after Fair Share forwarded a redline version correcting the "typo" to his counsel.

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As only acknowledged after this legal action was initiated, the First Summary's description of Section 2 was not a true and impartial summary. The Second Summary concedes and corrects these problems with Section 2.[42] As a result, Fair Share is willing to accept the Second Summary's description of Section 2.

B. The First Summary Is Biased and Misleading in Suggesting Confusion on the Plain Term "Additional" in the Fair Share Act, and the Second Summary Concedes this Point.

Section 1 of the Fair Share Act states, "the Oil and Gas Production Tax in AS 43.55 *shall be amended* as follows:" (emphasis added), and Section 4(b) (Tax on Production Tax Value) of the Fair Share Act ("Section 4(b)") states "An *additional* production tax shall be paid [when the] Production Tax Value of taxable oil is equal to or more than $50. The *additional* tax shall be the difference between the average monthly Production Tax Value of a barrel of oil and $50, multiplied by the volume of taxable oil . . . multiplied by 15 percent" (emphasis added).[43]

This Section 4(b) of the Fair Share Act simply creates a progressive tax by adding an "additional" tax bracket of 15 percent onto the existing tax of 35 percent when the "production tax value" is at $50 and above.[44] Thus, at below $50 per barrel of production tax valuc, the existing tax of 35 percent of production tax value under AS 43.55.011(e)(2) is unchanged and would continue to apply. While at $50 and above of production tax the existing tax of

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42 Exhibit D, Second Summary at 1.
43 Exhibit A, provisions of the Fair Share Act.
44 Exhibit A, provisions of the Fair Share Act. This is similar in concept to the progressive brackets added to Section 3 (Alternative Gross Minimum Tax) of the Fair Share Act.

35 percent under AS 43.55.011(e)(2) is unchanged and would continue to apply plus the "additional" tax under Section 4(b) of 15 percent or a total tax of 50 percent of production tax value would apply.

Any reasonable attempt to properly understand Section 4(b) must begin with the capitalized terms "Production Tax Value" in Section 4(b). These terms are capitalized because they are terms of art with a specific definition under AS 43.55.160(a)(1). AS 43.55.160(a)(1) defines "production tax value" as "the gross value at the point of production . . . under AS 43.55.011(e), less the producer's lease expenditures under AS 43.55.165 . . . ." Essentially, the term "production tax value" reflects one measure of an oil producer' s profits as determined from statutory definitions for gross income less lease expenditures. The existing and only current tax on "production tax value" is set forth in AS 43.55.011(e)(2), which provides that "after January 1, 2014, and before January 1, 2022, the tax is equal to the annual production tax value of the taxable oil and gas as calculated under AS 43.55.160(a)(1) multiplied by 35 percent."

Importantly, the existing 35 percent tax "production tax value" set forth in AS 43.55.011(e)(2) is the *only* tax on production tax value under AS 43.55. As the *only* such tax, the existing 35 percent tax on production tax value is the only tax possible that Section 4(b) was referencing when it identifies itself as an "additional" tax on production tax value. This

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obvious conclusion was even noted in the AGO which stated, "The sponsors likely intended for this to be in addition to the existing tax levied by AS 43.55.011(e)."[45]

Further, nothing in the Fair Share Act purports to repeal the existing 35 percent tax on production tax value set forth in AS 43.55.011(e)(2). To the contrary, Section 4(b) expressly identifies the tax it imposes as an "additional" tax on production tax value in two separate places. Section 4(b) also sets forth a detailed method of calculation that only applies the Section 4(b) additional tax as an "additional" tax at and above $50 per barrel of production tax value. Again, the language and proper calculation of the "additional" tax both anticipate the continuing application of the existing 35 percent tax on production tax value. Thus, the Section 4(b) "additional" tax on production tax value could only reasonably be read to mean in addition to the *only* existing tax on production tax value set forth in AS 43.55.011(e)(2).

In contrast, the AGO, while acknowledging "[t]he sponsors likely intended for this to be in addition to the existing tax levied by AS 43.55.011(e)," goes on to twist this obvious meaning to its exact opposite by concluding that the Section 4(b) "additional" tax must be a "standalone" tax which somehow repeals the existing 35 percent tax under AS 43.55.011(e).[46] Nothing in the plain language supports such a strained reading. There is no conflict whatsoever between an "additional" tax on the production tax value under Section 4(b) and the existing tax on production tax value under AS 43.55.011(e)(2), much less a conflict sufficient to implicitly repeal the existing tax. In fact, to reach such an extreme interpretation, the interpreter would

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[45] Exhibit B, AGO at 5.
[46] Exhibit B, AGO at 5.

have to ignore both references to the Section 4(b) additional tax as an "additional" tax, determine the existing 35 percent tax was implicitly repealed, and ignore the ludicrous results arising from any reasonable application of the tax[47].

This strained interpretation is exactly what Defendant Meyer chose to offer in the First Summary, rather than a true and impartial summary of the language of Section 4(b). Specifically, Defendant Meyer deleted any reference to the Section 4(b) additional tax as an "additional" tax, assumed the implicit repeal of the existing 35 percent tax, and then accepted the completely untenable resulting calculation by observing that the resulting tax would "would likely always be less" than the alternative tax on gross value and so would never be applied.

The Fair Share Act is intended to increase Alaskan's share of revenues by increasing the production tax on production tax value by eliminating credits, Section 4(a), and by adding an "additional" 15 percent to the existing 35 percent when the production tax value reaches $50 per barrel or above, Section 4(b). To interpret Section 4(b) to mean it implicitly repeals the existing 35 percent production tax on all production tax value and somehow substitutes in its place a 15 percent tax but only when production tax value is at $50 per barrel or above is not within the plain language or reason. This strained interpretation would mean the tax on production tax value would be 0 percent (instead of the intended existing 35 percent) when

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[47] The modeling for the Fair Share Act reveals that in 2018 it would have resulted in over $1 billion dollars of additional revenue for the State of Alaska. Under the strained interpretation by Meyer, the Fair Share Act would reduce production tax revenues to the State of Alaska in 2018.

production tax value was under $50 per barrel, as it is under most circumstances, and 15 percent (instead of the intended existing 35 percent plus the additional 15 percent or 50 percent) when production tax value was at $50 per barrel or above.[48] Such a strained interpretation would mean the entire Section 4's efforts to increase Alaskan's share by increasing production taxes on production tax value by eliminating credits, Section 4(a), and progressively increasing rates, Section 4(b), would be rendered meaningless. Simply stated, the "*additional*" tax simply does not mean, cannot be interpreted, and cannot be summarized in a true and impartial manner to mean the "*only*" tax on net production tax value. As such, the First Summary is not a true and impartial summary of Section 4(b). In fact, the First Summary is not a summary at all, but a biased interpretation that ignores the obvious meaning.

The Second Summary still semantically refers to the Fair Share Act's amendments to Alaska's production tax as "new" taxes but substantially concedes and corrects the above problems by grudgingly acknowledging the "additional" nature of Section 4(b) and removing the strained interpretation that it "would likely always be less than the tax above."[49] As a result, Fair Share is willing to accept the Second Summary's description of Section 4(b).

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[48] In fact, the drafters of the Fair Share Act specifically considered whether to reduce the existing 35 percent rate on production tax value to 25 percent and rejected that approach altogether.

[49] Exhibit D, Second Summary at 1.

C. The Summaries Are Biased and Misleading in Interpreting Section 7 of the Fair Share Act that Require Production Tax Filings Under the Fair Share Act "Shall Be a Matter of Public Record" to Mean the Production Tax Filings Will Remain Confidential.

Section 7 states, "All filings and supporting information provided by each producer to the Department relating to the calculation and payment of taxes set forth in Sections 3 and 4 shall be a matter of public record."[50] The common meaning of "matter of public record" in statute and case law is that "a matter of public record" is not confidential. For example, the relevant tax statute AS 40.25.100(a) provides that "[i]nformation in the possession of the Department of Revenue that discloses the particulars of the business or affairs of a taxpayer or other person . . . is not *a matter of public record* . . . . The information *shall be kept confidential* except when its production is required in an official investigation, administrative adjudication . . . or court proceeding" (emphasis added). If a document is "a matter of public record," the document is available to the public and not confidential.[51]

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[50] Exhibit A, provisions of the Fair Share Act.

[51] *See also, e.g.*, AS 27.21.100(c)(2) (trade secrets, commercial or financial information, and geologic information specifically identified as confidential by the applicant and determined by the commissioner to be not essential for public review *shall be kept confidential and not be made a matter of public record.*" (emphasis added)); AS 44.88.215(a) ("unless the records or information were *a matter of public record* before submittal to the authority, the following records and information *shall be kept confidential* if the person supplying the records or information or the project, bond, loan, or guarantee applicant or borrower requests confidentiality . . . . (emphasis added)); AS 39.90.010 ("A public employee may not be dismissed, demoted, suspended, laid off, or otherwise made subject to any disciplinary action for communicating *matters of public record* ... [a] violation of this section is a misdemeanor." (emphasis added)).

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Recognizing this correct interpretation, the AGO states: "[Section 7] would conflict with current law that actually makes it a crime to disclose confidential tax documents. [Footnote omitted] Based on the 'Notwithstanding . . .' language, we assume this provision is intended to supersede the existing statute for any tax documents submitted for areas falling under section 2 of the initiative bill."[52] While this statement in the AGO is offering an interpretation rather than a summary, it does offer exactly the correct interpretation of Section 7.

Unfortunately, the voice in the AGO which offered the correct interpretation was not the voice that guided the Summaries. In fact, the Summaries foreclose the acknowledged interpretation of the initiative sponsors entirely and are not true and impartial. The First Summary states, "The Act would also make all tax documents relating to the calculation and payment of the new taxes a matter of public record. *This would mean the documents would be reviewed under the normal Public Records Act process, and any information that needed to be withheld, for example for privacy or balance-of-interests reasons, would be withheld*" (emphasis added). In turn, this voice in the AGO goes on to suggest the application of the Public Records Act would mean confidentiality "would likely apply to most, if not all, of the tax documents."

The Second Summary shortens the erroneous sentence above to read: "This would mean the normal Public Records Act process would apply."[53] Given the AGO's observation that the

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52 Exhibit B, AGO at 6.
53 Exhibit D, Second Summary at 2.

normal Public Records Act process would result in "most, if not all, of the tax documents" remaining confidential,[54] Defendant Meyer's extraneous interpretive sentence may only mean the tax filings would remain confidential—the exact opposite of the plain meaning, the obvious intent of the language, the publicly stated intentions of the sponsors, and the AGO's own acknowledgment of the sponsors' intention. Far from being a true and fair summary of Section 7, Defendant Meyer's remaining interpretative sentence in the Second Summary would render Section 7 entirely meaningless because there would be no change whatsoever to the confidential status of tax filings under the Fair Share Act.

Preparing a true and impartial summary for an initiative is, by definition, an exercise in summarizing. It is not an exercise in interpreting the language of the initiative, much less interpreting the language in a biased manner that forecloses the acknowledged and most likely intention of the initiative sponsors.

This Court should not permit Defendant Meyer to substitute his voice for the voice of the initiative sponsors under the guise of providing a true and impartial summary. The initiative sponsors have stated in Section 7 that "All filings and supporting information provided by each producer to the Department relating to the calculation and payment of the taxes set forth in Section 3 and 4 shall be a matter of public record." The true and impartial summary of this language would be to simply state as the Second Summary does that, "The Act would also make all tax documents relating to the calculation and payment of the new taxes a matter of

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[54] Exhibit B, AGO at 6.

public record." And *not* to add, as the Second Summary continues, "This would mean the normal Public Records Act process would apply."

Defendant Meyers' extraneous interpretative sentence refers to the Public Records Act. There is no express reference in the Fair Share Act to the Public Records Act at all. As acknowledged by the AGO, the only implicit reference to the Public Records Act is the "notwithstanding" language of Section 1. Taken together, Section 1 and Section 7 would require tax filings under the Fair Share Act to be a matter of public record "notwithstanding any other statutory provision [including the Public Records Act] to the contrary."[55] If a proper extraneous interpretative sentence were needed (which it is not), it would read, "This would mean the normal Public Records Act process would [not] apply."[56]

As noted above, however, the Alaska Supreme Court has wisely counseled against allowing officials or the courts to conduct a pre-election review of an initiative noting that "pre-election review is a prudential one, steeped in traditional policies recognizing the need . . . to uphold the people's right to initiate laws directly, and to check the power of individual officials to keep the electorate's voice from being heard."[57] When the Fair Share Act is passed by the electorate, their voice will be clear that tax filings under the Fair Share Act "shall be a matter of public record" and not kept confidential from the electorate a moment longer. This Court should not permit Defendant Meyer to undercut the actual language of Section 7 and the

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55 Bracketed reference added.
56 Bracketed reference added.
57 *Alaskans for Efficient Government v. State*, 153 P.3d 296, 298 (Alaska 2007).

opportunity for the electorate's voice to be heard by substituting his own voice in place of the initiative sponsors' voice on the initiative summary.

Section 7 is a key provision of the Fair Share Act designed to allow Alaskans greater transparency into the impacts of our oil policies on the development of the hundreds of billions of dollars of oil resources. When Section 7 is enacted, it will allow all Alaskans to know the revenues, costs, and profits of each of the major international oil producers from each of the three largest and most profitable oil fields in Alaska. Initiatives are used to propose new laws. Initiative sponsors do not go through the difficulties of direct democracy to advance an initiative to change nothing. The very suggestion by Defendant Meyer that Section 7 is an attempt by the initiative sponsors to propose the same law as existed before the initiative is absurd and should not be given a moment's consideration by this Court.

Even assuming against all reason Defendant Meyer's interpretation of Section 7 is somehow plausible, the decision as to its correctness should be left to post-enactment litigation. Defendant Meyer summarized Section 7 perfectly when he stated, "The Act would also make all tax documents relating to the calculation and payment of the new taxes a matter of public record." Relevant to Section 7, the summary should stop after this sentence, it is true an impartial. Defendant Meyers additional extraneous, interpretative opinion that, "This would mean the normal Public Records Act process would apply" is neither true nor impartial and should be deleted. The purpose of the ballot summary is to provide a true and impartial description, and this correction would leave to post-adoption arguments whether Defendant Meyer's interpretation is correct rather than in the ballot summary where it does not belong.

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D. The Summary Should Be Corrected to Render It True and Impartial.

Fair Share offers the Court an edited version of the Summary that cures the problems discussed above.[58] Fair Share urges the Court to order this version be used for purposes of the ballot.

CONCLUSION

There are no genuine issues of material fact in this dispute, and Fair Share is entitled to summary judgment as a matter of law. The Summaries used by Defendant Meyer regarding Section 7 are neither true nor impartial and should be corrected by deleting the sentence, "This would mean the normal Public Records Act process would apply." Adopting the attached proposed order will ensure that "the integrity of the initiative process, along with our adherence to standards that favor the people's right to enact laws by initiative and that favor voters' rights to be informed about proposed initiative measures, will be maintained."[59]

RESPECTFULLY SUBMITTED this 12th day of May, 2020.

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[58] See proposed order filed herewith.
[59] *Planned Parenthood,* 232 P.3d at 734.

A BILL

FOR AN ACT ENTITLED

"An Act relating to the oil and gas production tax, tax payments, and tax credits."

BE IT ENACTED BY THE PEOPLE OF THE STATE OF ALASKA:

***Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

SHORT TITLE. This Act shall be known as the "Fair Share Act."

Notwithstanding Any Other Statutory Provisions to the Contrary, the Oil and Gas Production Tax in AS 43.55 Shall Be Amended as Follows:

***Section 2, Applicability.** The provisions in Sections 3 and 4 only apply to oil produced from fields, units, and nonunitized reservoirs north of 68 degrees north latitude that have produced in excess of 40,000 barrels of oil per day in the previous calendar year and in excess of 400,000,000 barrels of total cumulative oil production. For other oil production, the tax shall be unchanged by this Act.

***Section 3, Alternative Gross Minimum Tax.** For oil production from fields, units, and nonunitized reservoirs that meet the conditions in Sec. 2, the amount of tax due for each calendar month shall be no less than:

(a) 10 percent of the gross value at the point of production when the average per-barrel price for Alaska North Slope crude oil for sale on the United States West Coast (La. Basin) during the calendar month for which the tax is due is less than $50;

(b) an additional 1 percent of the gross value at the point of production for each $5 increment by which the average per-barrel price for Alaska North Slope crude oil for sale on the United States West Coast (La. Basin) during the calendar month for which the tax is due is equal to or exceeds $50. The maximum tax rate calculated in this section shall not exceed 15 percent, which is reached when the price per barrel is equal to or exceeds $70; and

(c) No credits, carried-forward lease expenditures, including operating losses, or other offsets may reduce the amount of tax due below the amounts calculated in this section.

***Section 4, Tax on Production Tax Value.** For production from fields, units, and nonunitized reservoirs that meet the conditions in Sec. 2:

(a) The per-taxable-barrel credit in AS 43.55.024(i) and (j) shall not be used; and

(b) An additional production tax shall be paid for each month for which the producer's average monthly Production Tax Value of taxable oil is equal to or more than $50. The additional tax shall be the difference between the average monthly Production Tax Value of a barrel of oil and $50, multiplied by the volume of taxable oil produced by the producer for the month, multiplied by 15 percent.

***Section 5, Separate Treatment.** For each producer, the taxes set forth in Sections 3 and 4 shall be calculated separately for the following:

(a) For oil and for gas;

(b) For each calendar month (annual lease expenditures shall be divided equally among the 12 months of the tax year); and

(c) For each of the fields, units, and nonunitized reservoirs, the lease expenditures shall be calculated, deducted, and carried forward separately.

***Section 6, Greater-of.** For each producer, for each month, and for each of the fields, units, and nonunitized reservoirs, the tax due shall be the greater of the tax under Section 3 or Section 4.

***Section 7, Public Records.** All filings and supporting information provided by each producer to the Department relating to the calculation and payment of the taxes set forth in Sections 3 and 4 shall be a matter of public record.

***Section 8, Scope of Initiative.** Nothing in this Act authorizes or requires the Legislature to dedicate revenue, to make or repeal appropriations, to enact local or special legislation, or to perform any unconstitutional act. While not required by this Act, the revenues from this Act could be used to fund essential government services, capital projects, the permanent fund, and permanent fund dividends.

***Section 9, Severability.** The provisions of this Act are independent and severable, and if any provision of this Act or applicability of any provision to any person or circumstance shall be found to be invalid, the remainder of this Act shall not be affected and shall be given effect to the fullest extent practicable.

THE STATE of ALASKA
GOVERNOR MICHAEL J. DUNLEAVY

Department of Law
CIVIL DIVISION

P.O. Box 110300
Juneau, Alaska 99811
Main: 907.465.3600
Fax: 907.465.2520

October 14, 2019

The Honorable Kevin Meyer
Lieutenant Governor
P.O. Box 110015
Juneau, Alaska 99811-0015

Re: *19OGTX Ballot Measure Application Review*
AGO No. 2019200671

Dear Lieutenant Governor Meyer:

You asked us to review an application for an initiative bill entitled:

An Act relating to the oil and gas production tax, tax payments, and tax credits. (19OGTX).

Despite the seemingly simple and straightforward title of the initiative bill, the language of the bill is difficult to interpret and raises a number of implementation and constitutional questions. The bill does not follow normal drafting conventions and does not clearly identify what statutes it is seeking to amend or create, while also stating that the new laws would go into effect "notwithstanding" any existing laws to the contrary. Because of these issues, the bill may not accomplish what was actually intended by the initiative sponsors. It is also likely to lead to litigation over the meaning of various provisions and questions of equal protection, due process, and the delegation of authority to Department of Revenue. These various issues are discussed briefly in the first section of this letter describing the proposed initiative bill.

However, none of these issues amount to legal grounds to deny certification of the initiative. Instead, these are mainly post-enactment concerns. The Alaska Supreme Court "refrain[s] from giving pre-enactment opinions on the constitutionality of statutes, whether proposed by the legislature or by the people through their initiative power, since an opinion on a law not yet enacted is necessarily advisory."[1] Because the low threshold

[1] *Kohlhaas v. State*, 147 P.3d 714, 717 (2006).

required of initiatives is met, we conclude that the application complies with the constitutional and statutory provisions governing the initiative process.

I. The proposed initiative bill.

The bill proposed by this initiative would change the production tax applied to certain oil production on the North Slope where the company produced more than 40,000 barrels of oil per day in the prior year and more than 400 million barrels of total cumulative production. This applicability section uses new terms such as "field" and "units," currently not used in the tax code, so it is unclear exactly what areas would fall under this new tax regime.

The initiative bill would change the production tax such that oil meeting the production thresholds stated above would be taxed according to the greater of one of two new taxes. One tax—in Section 3 of the initiative bill—would be a tax on the gross value at the point of production of the oil at a rate of 10 percent when oil is less than $50 per-barrel to a maximum of 15 percent when oil is $70 per-barrel or higher. In existing law, the gross value at the point of production is calculated with deductions for transportation costs.

The other tax—in Section 4 of the initiative bill—is more difficult to ascertain. It would be based on a calculation of a production tax value for the oil that would allow deductions for certain lease expenditures in addition to transportation costs. This tax on production tax value would be calculated based on the difference between the production tax value of the oil and $50, the remainder of which would be multiplied by the volume of the oil, and then the product of that would be multiplied by 15 percent. Where it gets truly confusing is that the initiative bill describes this tax as an "additional production tax," but includes no reference to the tax to which it is meant to be added. Because it is unclear what tax it would be added to, the plain reading of the bill language is that it would not be in addition to any other tax for that oil. The only tax applied could be the so-called "additional tax," and this tax would always be lower than the alternative gross minimum tax in section 3 because of the way they are both calculated. In this event, it is unclear whether the initiative could result in a tax increase or decrease across various oil prices when compared to existing tax law. .

The initiative bill would also eliminate the applicability of certain tax credits and other tax incentives against these two taxes. The taxes would also be calculated for each field, unit, or nonunitized reservoir on a monthly basis, instead of an annual basis.

As a starting point, the initiative bill fails to amend specific statutes and instead includes the general phrase: "Notwithstanding Any Other Statutory Provisions to the Contrary, the Oil and Gas Production Tax in AS 43.55 Shall Be Amended as Follows." It

is unclear how these provisions will actually be inserted into existing statute by the revisor of statutes, which makes it difficult to determine exactly how the initiative bill would change existing law.[2] The vagueness of the language and the lack of definitions would also lead to numerous implementation and potential constitutional concerns post-enactment. In light of the difficulties interpreting this initiative bill, the following provides a sectional summary of the initiative bill and a discussion of the implementation and potential legal concerns with each section.

Section 1 would add the short title "Fair Share Act" to uncodified law.

Section 2 would add an applicability section to establish that the new taxes under section 3 (alternative gross minimum tax) and section 4 (tax on production tax value) apply only to oil produced from "fields, units, and nonunitized reservoirs" north of 68 degrees North latitude that have produced in excess of 40,000 barrels of oil per day (bpd) in the previous calendar year and 400,000,000 barrels of total cumulative oil production. It is unclear from the language in the initiative bill as to whether the change in tax would apply to oil meeting one or both of the above production thresholds. The bill also fails to provide any definitions for "fields, units, or nonunitized reservoirs." These implementation issues may ultimately raise constitutional concerns, such as whether the law unconstitutionally violates equal protection[3] and due process.[4]

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[2] Vagueness or failure to follow technical drafting requirements is not a ground on which an initiative application can be denied.

> The general rule is that a court should not determine constitutionality of an initiative unless and until it is enacted. The rule against pre-election review is a prudential one, steeped in traditional policies recognizing the need to avoid unnecessary litigation, to uphold the people's right to initiative laws directly, and to check the power of individual officials to keep the electorate's voice from being heard."

Alaskans for Efficient Government, Inc. v. State, 153 P.3d 296, 298 (Alaska 2007).

[3] See *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973) (The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from others. The test is whether the difference in treatment is an invidious discrimination); *State v. Reefer King Co., Inc.*, 559 P.2d 56, 65 (Alaska 1976) (the classification in question must "be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike").

[4] See *Pacific Tel. & Tel. Co. v. City of Seattle, Wash.*, 291 U.S. 300, 304 (1934)

Under existing law, the State is divided into segments for purposes of the oil and gas production tax. Oil from the North Slope and gas not used in the state produced on the North Slope are included in one segment. Instead of one North Slope segment for this oil, section 2 would divide the North Slope segment into the "fields, units, and nonunitized reservoirs" that meet the production thresholds and then all other areas would remain under the current oil and gas production tax regime. This would be the first time the terms "fields, units, and nonunitized reservoirs" would be found within the tax statutes, and the initiative bill does not provide any definitions or guidelines for how the Department of Revenue should determine what this means. This raises questions on the delegation of taxing authority and the discretion granted to the Department of Revenue to sort out which areas of the North Slope are taxed under the 19OGTX tax regime and which areas fall under the existing tax statutes.

Additionally, there is a question of when the tax would go into effect if these thresholds are met. Would it occur the next tax year after the threshold was reached or the month after the threshold was reached?

Section 3 would establish a "monthly alternative gross minimum production tax" on oil identified in section 2. The gross tax rate would be 10 percent of the gross value of oil at the point of production in a calendar month where the average per-barrel price for Alaska North Slope (ANS) crude oil for sale on the United States' West Coast is less than $50. The gross tax due under this section would increase by 1 percent of the gross value at the point of production for each $5 increment by which the average per-barrel price for Alaska North Slope crude oil for sale on the United States' West Coast is equal to or exceeds $50. The maximum tax rate under this section may not exceed 15 percent when ANS is $70 per barrel or higher. Credits, carried-forward lease expenditures, operating losses or other offsets may not be used to reduce the amount of tax due below the amounts calculated under section 3.

Under existing law, a tax floor amount is calculated based on the gross value of oil for North Slope oil and gas on a segment basis as part of the annual tax levy. Generally in existing law, the application of tax credits, carried-forward lease expenditures, and other

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> The demands of due process are satisfied if reasonably clear definition is afforded in time to give the taxpayer an opportunity to comply... Before the duties of the administrative officer are performed we cannot say that the ordinance falls short of that requirement. At this stage appellant can show no more than apprehension that the definition which the administrative officer will lay down may be deficient. The Constitution cannot allay that fear.

offsets are not limited to the tax based on production from a particular field or unit. By creating these more discrete segments and a separate monthly tax levy, Department of Revenue would have an increased administrative responsibility to keep track of the different segments and when credits, etc. could be used. It would also have to be done on a monthly basis, instead of an annual basis, which means the per-barrel price of oil will have to be tracked each month, instead of the average over the year.

Section 4 would apply to oil identified in section 2 but only if the monthly tax would be greater under this section than the calculation in section 3 as required by section 6 of the bill. For that oil, the per-taxable-barrel credit under AS 43.55.024(i) and (j) may not be used. Further, a tax would be levied for each month in which a producers' average monthly production tax value for oil is equal to or more than $50. The tax due is the difference between the average monthly production tax value for a barrel of oil and $50, multiplied by the volume of taxable oil produced by that producer in a month, multiplied by 15 percent.

Subsection (b) of this section directs that: "An *additional* production tax shall be paid..." But no effort is made to identify what the "additional production tax" is in addition *to*, and the plain language of the initiative bill does not provide an answer. The sponsors likely intended for this to be in addition to the existing tax levied by AS 43.55.011(e). But the "Notwithstanding" language at the top of the initiative bill would seem to indicate that other tax statutes to the contrary do not apply when the production being taxed falls under the applicability section. Although it is unclear exactly how this section would ultimately be placed into the statutes, the plain reading limits the tax to what is included in section 4—meaning that it is a standalone tax, not added to another tax for that oil.

Section 5 would require that the alternative gross minimum tax (proposed in section 3) and the additional production tax (proposed in section 4) shall be calculated separately for oil and gas in each calendar month. In the monthly calculation, lease expenditures shall be divided equally over the 12 months of the tax year. Further, for each of the subject properties, lease expenditures shall be calculated, deducted, and carried forward separately.

This is the first mention of gas in the initiative bill. Section 2 only applies to oil production and sections 3 and 4 only apply to production that meets the threshold in section 2—which is only oil production. Yet, section 5 states that oil and gas under sections 3 and 4 should be calculated separately. It is unclear what this provision would accomplish. The plain reading of sections 3 and 4 is that they would only apply to oil production and not gas production. This would be an implementation issue for the Department of Revenue.

Section 6 would provide that the tax due in a month shall be the greater of the tax levied under section 3 (alternative gross minimum tax) or section 4 (tax on production tax value).

As mentioned above, the plain meaning of section 6 is that the tax due will be determined by the greater of the calculation in sections 3 or 4, not section 4 plus some other tax. The likely result would be that section 4 is never implemented because the ten to fifteen percent alternative minimum tax is on the gross value and the fifteen percent under section 4 is on the net value. There is no legislative history to help determine the intent for these provisions, and it would be difficult to insert language into the initiative bill or insert another statute that is not expressly referenced.

Section 7 would establish that all filings and supporting information provided to the Department of Revenue relating to the tax calculations of sections 3 and 4 shall be a matter of public record. Although this could raise concerns over the constitutional right to privacy, the reality is that most of the tax documents would still likely be protected from disclosure. This is because making the tax documents "a matter of public record" simply means the Public Records Act applies, instead of being exempt from it. Under the Public Records Act, the Department of Revenue would have to review all the requested records and redact those portions that should be protected for reasons of privacy, proprietary information, or balance of interests, for example. These protections would likely apply to most, if not all, of the tax documents.

This section would conflict with current law that actually makes it a crime to disclose confidential tax documents.[5] Based on the "Notwithstanding..." language, we assume this provision is intended to supersede the existing statute for any tax documents submitted for areas falling under section 2 of the initiative bill. This could be difficult to implement for the Department of Revenue because a document may contain information about multiple areas or require multiple different tax filings in order to keep them separate.

Section 8 states that nothing in the proposed legislation requires a dedication of revenue, enactment of local or special legislation, or performance of an unconstitutional act. The section would provide that the legislature could, but is not required to, use the revenues obtained from enactment of this act for essential government services, capital projects, the permanent fund, and permanent fund dividends.

Section 9 is a severability clause.

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5 AS 43.05.230.

II. Analysis.

Under AS 15.45.070, the lieutenant governor must review an application for a proposed initiative bill within 60 calendar days of receipt and "certify it or notify the initiative committee of the grounds for denial." The application for the 19OGTX initiative was filed with the Division of Elections on August 16, 2019. The sixtieth calendar day after the filing of the initiative is Tuesday, October 15, 2019.

Under AS 15.45.080, certification shall be denied only if: "(1) the proposed bill to be initiated is not confined to one subject or is otherwise not in the required form; (2) the application is not substantially in the required form; or (3) there is an insufficient number of qualified sponsors."

A. Form of the proposed initiative bill.

In evaluating an application for an initiative bill, you must determine whether the application is in the "proper form."[6] Specifically, you must decide whether the application complies with "the legal procedures for placing an initiative on the ballot, and whether the initiative contains statutorily or constitutionally prohibited subjects which should not reach the ballot."[7]

The form of an initiative bill is prescribed by AS 15.45.040, which requires four things: (1) that the bill be confined to one subject; (2) that the subject be expressed in the title; (3) that the bill contain an enacting clause stating: "Be it enacted by the People of the State of Alaska"; and (4) that the bill not include prohibited subjects. The list of prohibited subjects is found in article XI, section 7 of the Alaska Constitution and AS 15.45.010. An initiative bill includes a prohibited subject when it makes or repeals appropriations; enacts local or special legislation; dedicates revenue; or creates courts, defines their jurisdiction, or prescribes their rules.[8] You may deny certification only if the measure violates one or more of these restrictions, or if "controlling authority establishes its unconstitutionality."[9]

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6 Alaska Const. art. XI, § 2.

7 *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 87 n.7 (Alaska 1988).

8 AS 15.45.010; *see also* Alaska Const. art. XI, § 7 (prohibiting dedicating revenue, creating courts, defining court jurisdiction or prescribing court rules).

9 *Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 900 n. 22 (Alaska 2003) (this is an exception to the general rule that the court will not review the constitutionality of legislation or initiative pre-enactment; the example given is a bill requiring segregation in direct violation of *Brown v. Board of Educ. Of Topeka, Kan.*, 349 U.S. 294 (1955)).

The initiative bill meets all four requirements of AS 15.45.040. It is confined to one subject—oil and gas taxation. The subject is expressed in the title, and the bill has the required enacting clause. Finally, it does not include any of the prohibited subjects and is not clearly unconstitutional under existing authority.

When evaluating the initiative bill, we carefully considered whether the initiative bill would enact local or special legislation and whether it violates the single-subject rule. When reviewing ballot initiatives, the court will "construe voter initiatives broadly so as to preserve them whenever possible. However, whether an initiative complies with article XI, section 7's limits on the right of direct legislation requires careful consideration."[10]

In order to determine if the initiative bill would enact special or local legislation, the court first considers "whether the proposed legislation is of general, statewide applicability."[11] If the answer is yes, then there is no violation. But if the answer is no, you must then ask "whether the initiative nevertheless bears a fair and substantial relationship to legitimate purposes."[12] This is similar to the most deferential standard applied in an equal protection review.[13] The court has also said the legislation or initiative bill "need not operate evenly on all parts of the state to avoid being classified as local or special."[14]

19OGTX further divides what is currently known as the North Slope segment for purposes of the oil and gas production tax. Instead of one North Slope segment, the initiative bill appears to divide the North Slope into "fields, units and nonunitized reservoirs"[15] that meet the applicability section and other areas that do not meet the applicability section. The purpose of these changes is presumably to increase the State's share of money from oil and gas development. Oil and gas development generally is a matter of statewide concern and will have statewide impacts both in the private sector and the public sector. Previous court cases have found that maximizing the economic benefits of oil and gas production to the people of Alaska is a legitimate state purpose.[16] This initiative bill would further divide the North Slope segment with the goal of bringing

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10 *Hughes v. Treadwell*, 341 P.3d 1121, 1125 (Alaska 2015).

11 *Id.* at 1131.

12 *Ibid.*

13 *Ibid.*

14 *Boucher v. Engstrom*, 528 p.2d 456, 463 (Alaska 1974).

15 These terms are not currently found in the Department of Revenue statutes or regulations governing taxation. Likewise, the term "nonunitized reservoir" is not currently found in the Department of Natural Resources statutes or regulations.

16 *Baxley v. State*, 958 P.2d 422, 431 (Alaska 1998).

more money into the state treasury, which in turn funds government services. Similar to bills amending Northstar oil and gas leases,[17] authorizing a three-way land exchange,[18] and excluding Fairbanks and Anchorage from being the capital,[19] this initiative bill appears to bear a fair and substantial relationship to the legitimate purpose of developing the State's oil and gas resources in the interest of all Alaskans. Therefore, it is not considered special or local legislation.

We also evaluated whether 19OGTX violates the single-subject rule because it includes both a substantive change to oil and gas laws as well as a change to the way tax records are treated and a statement on what the revenue could be spent on. Article II, section 13 of the Alaska Constitution requires that "[e]very bill shall be confined to one subject." In the context of initiative bills, the single-subject rule is intended to protect "the voters' ability to effectively exercise their right to vote by requiring that different proposals be voted on separately."[20] Confining initiative bills to one subject assures both that voters can "express their will through their votes more precisely," and "prevents the adoption of policies through stealth or fraud, and prevents the passage of measures lacking popular support by means of log-rolling."[21] Log-rolling, the Court has explained, "consists of deliberately inserting in one bill several dissimilar or incongruous subjects in order to secure the necessary support for passage of the measure."[22]

We conclude that 19OGTX does not violate the single-subject rule because the provisions all relate to the administration of the proposed oil and gas tax. Section 7 of the initiative bill relates specifically to the tax records filed under "the calculation and payment of the taxes set forth in Section 3 and 4." It is not a separate and distinct proposal on public records, but rather implements how documents that are created because of the new tax should be handled. Under existing law, these documents are all confidential and are not considered public records.[23] This initiative bill would make the

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17 *Id.* at 430-431.

18 *State v. Lewis*, 559 P.2d 630, 643 (Alaska 1977).

19 *Boucher v. Engstrom*, 528 P.2d 456, 462-64 (Alaska 1974).

20 *Id.*

21 *Id.*

22 *Gellert*, 522 P.2d at 1122; see also Proceedings of the Alaska Constitutional Convention at 1746-47 (discussion of the single-subject requirement and the concern over log-rolling).

23 AS 40.25.100, 43.05.230.

tax documents filed under the new tax regime public records and subject to the Public Records Act, including the protections provided under the Public Records Act like proprietary information and balance of interests.[24]

Additionally, section 8 of the initiative bill does not amount to a separate and distinct subject. Section 8 simply states the legal reality that revenues generated by the new oil and gas tax "*could* be used to fund essential government services, capital projects, the permanent fund, and permanent fund dividends." It does not attempt to dedicate the funds to any particular purpose or create a new program that would be funded by this money. Oil and gas tax and royalties make up the majority of the money in the state general fund, which is then used to pay for the State's budget. Section 8 of the bill is acknowledging this fact and does not create any new distinct proposal that would amount to log-rolling, even if the language is clearly included to entice people to vote for the initiative bill.

The conclusion that an initiative bill satisfies the constitutional and statutory requirements does not speak to the initiative bill's ultimate constitutionality or workability. The Alaska Supreme Court "refrain[s] from giving pre-enactment opinions on the constitutionality of statutes, whether proposed by the legislature or by the people through their initiative power, since an opinion on a law not yet enacted is necessarily advisory."[25] The question is about timing—when is a lawsuit challenging an initiative bill proper, and the answer is often after the initiative bill has been enacted. As detailed in the discussion above regarding the initiative bill's provisions, 19OGTX raises many questions that cannot be answered until the revisor of statutes places the initiative bill in the statutes and the Department of Revenue adopts regulations interpreting the new statutory provisions. At this stage, "all doubts as to all technical deficiencies or failure to comply with the exact letter of procedure will be resolved in favor of the" liberal construction of the initiative bill.[26] This in no way forecloses, and we do not opine on, future litigation over the constitutionality or interpretation of the initiative bill post-enactment. There are significant constitutional issues that can be argued with respect to this bill. However, these issues must be addressed by the courts post-enactment if legal challenges are made.

B. Form of the application.

The form of an initiative application is prescribed by AS 15.45.030, which provides that the application must include the

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24 AS 40.25.120(4), (12), (14)

25 *Kohlhaas v. State*, 147 P.3d 714, 717 (2006).

26 *Yute Air Alaska Inc. v. McAlpine*, 698 P.2d 1173, 1181 (Alaska 1974).

(1) proposed bill;

(2) printed name, the signature, the address, and a numerical identifier of not fewer than 100 qualified voters who will serve as sponsors; each signature page must include a statement that the sponsors are qualified voters who signed the application with the proposed bill attached; and

(3) designation of an initiative committee consisting of three of the sponsors who subscribed to the application and represent all sponsors and subscribers in matters relating to the initiative; the designation must include the name, mailing address, and signature of each committee member.

The application on its face meets the first requirement, as well as the latter portion of the second requirement regarding the statement on each signature page. With respect to the first clause of the second requirement, we understand the Division of Elections has reviewed the sponsor signatures and determined that the application contains the signatures and addresses of 163 qualified voters. The application also designates three sponsors to serve on an initiative committee, thus satisfying the third requirement. Therefore, the application is in the proper form.

III. Proposed ballot and petition summaries.

We have prepared a ballot-ready petition title and summary to assist you in complying with AS 15.45.090(2) and AS 15.45.180, as is our office's standard practice. Under AS 15.45.180 a ballot proposition must include a "true and impartial summary of the proposed law." That provision also requires that an initiative's title be limited to 25 words, and that the number of words in the body of the summary be limited to the number of sections in the proposed law multiplied by fifty. "Section" is defined as "a provision of the proposed law that is distinct from other provisions in purpose or subject matter."

The bill has nine sections, which would allow the number of words in the summary not to exceed 450. Below is a summary with 20 words in the title and 396 words in the summary, which we submit for your consideration.

An Act changing the oil and gas production tax for certain fields, units, and nonunitized reservoirs on the North Slope

This act would change the oil and gas production tax for areas of the North Slope where the company produced more than 40,000 barrels of oil per day in the prior year and/or more than 400 million barrels total. It is unclear whether the area has to meet both the 40,000 and 400,000 million thresholds or just one of them. The new areas would be divided up based on "fields, units, and nonunitized reservoirs" that meet the production threshold. The Act does not define what a field or unit is. For any areas that meet the production threshold, the tax would be the greater of one of two new taxes.

(1) One tax would be a tax on the gross value at the point of production of the oil at a rate of 10% when oil is less than $50 per-barrel. This tax would increase to a maximum of 15% when oil is $70 per-barrel or higher. No deductions could take the tax below the 10% to 15% floor.

(2) The other tax would be based on a calculation of a production tax value for the oil that would allow lease expenditure and transportation cost deductions. This tax on production tax value would be calculated based on the difference between the production tax value of the oil and $50. The difference between the two would be multiplied by the volume of oil, and then that amount would be multiplied by 15%. The existing per-taxable-barrel credit would not apply. The Act uses the term "additional tax" but it does not designate what tax is in addition to. The result is that this tax would likely always be less than the tax above.

The Department of Revenue would calculate the tax for each field, unit, or nonunitized reservoir on a monthly basis. Taxes are currently calculated on an annual basis, with monthly estimated payments. Since these new taxes would only apply to certain areas, a taxpayer would still have to submit annual taxes for the areas where the new taxes do not apply.

The Act would also make all tax documents relating to the calculation and payment of the new taxes a matter of public record. This would mean the documents would be reviewed under the normal Public Records Act process, and any information that needed to be withheld, for example for privacy or balance-of-interests reasons, would be withheld.

Should this initiative become law?

This summary has a Flesch test score of 54.7. We believe the summary satisfies the target readability standards of AS 15.80.005.[27]

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[27] Under AS 15.80.005(b), "The policy of the state is to prepare a neutral summary that is scored at approximately 60." While this summary is slightly below the target readability score of 60, the Alaska Supreme Court has upheld ballot summaries scoring as

IV. Conclusion.

Despite the failure to follow technical drafting requirements, the proposed bill and application are in the proper form for an initiative and the application complies with the constitutional and statutory provisions governing the use of the initiative. We therefore recommend that you certify the initiative bill application and notify the initiative committee of your decision. You may then begin to prepare a petition under AS 15.45.090.

Please contact us if we can be of further assistance to you on this matter.

Sincerely,

KEVIN J. CLARKSON
ATTORNEY GENERAL

By:

Cori Mills
Assistant Attorney General

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low as 33.8 for a complicated ballot initiative. *See* 2007 Op. Att'y Gen. (Oct. 17; 663070179); *Pebble*, 215 P.3d at 1082-84.

From: Mills, Cori M (LAW)
To: Robin O. Brena
Subject: Re: Summary of the Fair Share Act
Date: Monday, October 21, 2019 5:27:40 PM

Mr. Brena, after consulting with the Attorney General and the Division of Elections, we have to respectfully decline your request. I think there is a misunderstanding about the sponsors' role in the creation of petition booklets. This is a statutory duty carried out by the Lt. Governor through the Division of Elections.

Once the decision is certified, the Division finalizes the summary and sends off the booklets for printing. The petition booklets will be completed tomorrow by the printer, from my understanding. We believe the summary meets the statutory requirements of neutrality and readability.

The prior instances where we have gotten feedback on a summary before finalizing is in the context of ongoing litigation over certification.

I apologize for the delay in responding. I traveled to Anchorage for a court hearing and have not had an opportunity to sit down and respond until now.

Cori Mills
Assistant Attorney General
Department of Law

On Oct 21, 2019, at 9:10 AM, Robin O. Brena <rbrena@brenalaw.com> wrote:

> Ms. Mills:
>
> Robin asked that I touch base with you regarding his email dated October 18, 2019. He would like to meet with you today, if you are available. Please reply with your availability.
>
> Thank you,
>
> **PRIVILEGED AND CONFIDENTIAL**
>
> **Melody Nardin**
> **Legal Assistant**
> <image001.jpg>
>
> 810 N Street, Suite 100
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From: Mills, Cori M (LAW) <cori.mills@alaska.gov>
Sent: Friday, October 18, 2019 9:03 AM
To: Robin O. Brena <rbrena@brenalaw.com>
Subject: Automatic reply: Summary of the Fair Share Act

Friday, October 17 is a state holiday, and all state offices will be closed. I will be in Anchorage on business on Monday, October 21 but will be checking email and voicemail when I have a chance.

Thank you.

Cori Mills

Lieutenant Governor Kevin Meyer
STATE OF ALASKA

March 17, 2020

Robin O. Brena
810 N Street, Suite 100
Anchorage, AK 99501

Re: 19OGTX – Fair Share Initiative

Mr. Brena:

I have reviewed your petition for the initiative entitled "An Act changing the oil and gas production tax for certain fields, units, and nonunitized reservoirs on the North Slope" and have determined that the petition was properly filed. My notice of proper filing is enclosed. Specifically, the petition was signed by qualified voters from all 40 house districts equal in number to at least 10 percent of those who voted in the preceding general election; with signatures from at least 30 house districts matching or exceeding seven percent of those who voted in the preceding general election in the house district. The Division of Elections verified 39,174 voter signatures, which exceeds the 28,501 signature requirement based on the 2018 general election. A copy of the Petition Statistics Report prepared by the Division of Elections is enclosed.

With the assistance of the attorney general, I have prepared the following ballot title and proposition that meets the requirements of AS 15.45.180:

An Act changing the oil and gas production tax for certain fields, units, and nonunitized reservoirs on the North Slope

This act would change the oil and gas production tax for areas of the North Slope where a company produced more than 40,000 barrels of oil per day in the prior year and more than 400 million barrels total. The new areas would be divided up based on "fields, units, and nonunitized reservoirs" that meet the production threshold. The act does not define these terms. For any areas that meet the production threshold, the tax would be the greater of one of two new taxes.

(1) One tax would be a tax on the gross value at the point of production of the oil at a rate of 10% when oil is less than $50 per barrel. This tax would increase to a maximum of 15% when oil is $70 per barrel or higher. No deductions could take the tax below the 10% to 15% floor.

(2) The other tax, termed an "additional tax," would be based on a calculation of a production tax value for the oil that would allow lease expenditure and transportation cost deductions. This tax on production tax value would be calculated based on the difference between the production tax value of the oil and $50. The difference between the two would be multiplied by the volume of oil, and then that amount would be multiplied by 15%. The existing per-taxable-barrel credit would not apply. The act uses the term "additional tax" but it does not specify what the new tax is in addition to.

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The tax would be calculated for each field, unit, or nonunitized reservoir on a monthly basis. Taxes are currently calculated on an annual basis, with monthly estimated payments. Since these new taxes would only apply to certain areas, a taxpayer would still have to submit annual taxes for the areas where the new taxes do not apply.

The act would also make all filings and supporting information relating to the calculation and payment of the new taxes "a matter of public record." This would mean the normal Public Records Act process would apply.

Should this initiative become law?

This ballot proposition will appear on the election ballot of the first statewide general, special, or primary election that is held after (1) the petition has been filed; (2) a legislative session has convened and adjourned; and (3) a period of 120 days has expired since the adjournment of the legislative session. Barring an unforeseen special election or adjournment of the current legislative session occurring on or before April 19, 2020, this proposition will be scheduled to appear on the general election ballot on the November 3, 2020 general election. If a majority of the votes cast on the initiative proposition favor its adoption, I shall so certify and the proposed law will be enacted. The act becomes effective 90 days after certification.

Please be advised that under AS 15.45.210, this petition will be void if I, with the formal concurrence of the attorney general, determine that an act of the legislature that is substantially the same as the proposed law was enacted after the petition has been filed and before the date of the election. I will advise you in writing of my determination in this matter.

Please be advised that under AS 15.45.240, any person aggrieved by my determination set out in this letter may bring an action in the superior court to have the determination reversed within 30 days of the date on which notice of the determination was given.

If you have questions or comments about the ongoing initiative process, please contact my staff, April Simpson, at (907) 465-4081.

Sincerely,

Kevin Meyer
Lieutenant Governor

Enclosures

cc: Kevin G. Clarkson, Attorney General
Gail Fenumiai, Director of Elections

jnu.law.ecf@alaska.gov

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

VOTE YES FOR ALASKA'S FAIR SHARE, Plaintiff, v. KEVIN MEYER, LIEUTENANT GOVERNOR OF THE STATE OF ALASKA, and STATE OF ALASKA, DIVISION OF ELECTIONS, Defendants.	Case No. 3AN-19-11106 CI

DEFENDANTS' ANSWER

Defendants Lieutenant Governor Kevin Meyer and the Division of Elections respond to the allegations in Plaintiff Vote Yes for Alaska's Fair Share's (Fair Share) Complaint in the following paragraphs. The Complaint also included an Introduction that appears to present a summary of Fair Share's legal argument. In so far as the Introduction presents legal arguments and conclusions, Defendants deny any legal conclusions set forth in the Introduction. Also, any allegations in the Introduction require no response as the allegations are improperly pled for lack of separate statements required under Alaska Civil Rule 10(b). It is worth noting that Fair Share's Complaint suffers from a foundational misunderstanding of the initiative process. The Complaint refers to the statute on creating a ballot summary, but is complaining of the language that was included in the petition summary under AS 15.45.090(a)(2). These are two different requirements. The lieutenant governor creates a ballot summary only if

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the petition is certified under AS 15.45.150-.160. That has not occurred yet, and therefore, the lieutenant governor has taken no action to create a ballot summary.

1. The defendants admit that Robin O. Brena, Jane R. Angvik, and R. Merrick Pierce are the initiative committee sponsors for the 19OGTX initiative application. The defendants lack sufficient information to admit or deny the remaining allegations in Paragraph 1.

2. Admitted.

3. Admitted.

4. The defendants admit the superior court is the proper court to hear this matter but deny that the relief requested and the timing of the lawsuit are legally appropriate.

5. The defendants admit that this paragraph accurately quotes AS 15.45.240.

6. Denied.

7. The defendants admit the determination on certification of the application was sent to the sponsors on October 15, 2019, and that Fair Share brought this complaint within 30 days of that notification, but the defendants deny that the relief requested and the timing of the lawsuit are legally appropriate.

8. Admitted.

9. Admitted.

10. The defendants admit this paragraph accurately quotes paragraphs (1)-(3) of AS 15.45.080, but deny any legal interpretation implied by the use of the term "only."

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11. The defendants admit that Lieutenant Governor Meyer certified the application on October 15, 2019. The defendants deny that Lieutenant Governor Meyer had any legal obligation to prepare a ballot title and proposition under AS 15.45.180(a) because that duty is triggered by certification of the petition under AS 15.45.150-.160, not certification of the application under AS 15.45.070-.080. The defendants admit that this paragraph accurately quotes part of the third sentence of AS 15.45.180(a).

12. The defendants admit that page 12 of the Attorney General Opinion contains a proposed ballot summary, but deny that any official ballot summary exists at this stage. The defendants admit that the Attorney General Opinion was sent to Fair Share on October 15, 2019, and this provided notice to Fair Share of a proposed ballot summary drafted by the Department of Law. All remaining allegations in this paragraph are denied.

13. The defendants deny that there were any communications regarding a ballot summary under AS 15.45.180; the email communications received from Fair Share related to the summary for purposes of the petition under AS 15.45.090(a)(2). The defendants admit the remainder of the allegations.

14. The defendants refer to their responses to paragraphs (1)-(13).

15. Denied.

16. The defendants admit that this paragraph accurately quotes part of the first sentence of Section 2 of the initiative bill. All remaining allegations in this paragraph are denied.

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17. Admitted in so far as it is quoting the petition summary or the proposed summary in the Attorney General Opinion.

18. Denied.

19. The defendants admit the petition summary includes a typo where it should say 400 million instead of "400,000 million." All remaining allegations are denied.

20. The defendants admit that this paragraph accurately quotes part of the heading on page 1, lines 9-10 of the initiative bill.

21. The defendants admit that this paragraph accurately quotes parts of the first and second sentences of Section 4(b) of the initiative bill, excluding the parenthetical "[when the]." All remaining allegations are denied.

22. The defendants admit that AS 43.55.011(e)(2) levies a tax for certain oil and gas produced equal to the annual production tax value of the taxable oil and gas as calculated under AS 43.55.160(a)(1) multiplied by 35 percent. All remaining allegations are denied.

23. The defendants admit that Section 4(b) of the initiative bill uses the term "additional tax" in two places and this paragraph accurately quotes a sentence from the Attorney General Opinion. All remaining allegations are denied.

24. The defendants admit that this paragraph accurately quotes parts of the petition summary or the summary proposed in the Attorney General Opinion. The defendants also admit that this paragraph accurately quotes a sentence from the Attorney General Opinion. All remaining allegations are denied.

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25. Denied.

26. The defendants admit that this paragraph accurately quotes Section 7 of the initiative bill.

27. The defendants admit that this paragraph accurately quotes parts of AS 40.25.100(a). All remaining allegations are denied.

28. The defendants admit that this paragraph accurately quotes a sentence from the Attorney General Opinion. All remaining allegations are denied.

29. The defendants admit that this paragraph accurately quotes the petition summary or the proposed summary in the Attorney General Opinion. The defendants also admit that, except for the added parenthetical "[confidential]," this paragraph accurately quotes a sentence from the Attorney General Opinion.

30. The defendants admit that Section 7 of the initiative bill states that the documents "shall be a matter of public record." All remaining allegations are denied.

31. Denied.

AFFIRMATIVE DEFENSES

1. The plaintiff's complaint is not ripe.

2. The plaintiff's prayer for relief is improper and unlawful.

3. The plaintiff fails to state a claim for which relief may be granted.

4. The plaintiff may not be an aggrieved person and thus may lack standing.

//

//

PRAYER FOR RELIEF

The defendants pray for judgment and relief as follows:

1. That the Complaint be dismissed with prejudice on all claims asserted against all defendants;

2. That the defendants be awarded all attorney's fees and costs allowed by law.

DATED February 10, 2020

KEVIN G. CLARKSON
ATTORNEY GENERAL

By:
for Cori M. Mills
Assistant Attorney General
Alaska Bar No. 1212140

for Margaret Paton-Walsh
Chief Assistant Attorney General
Alaska Bar No. 0411074

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

VOTE YES FOR ALASKA'S FAIR SHARE, Plaintiff, v. KEVIN MEYER, LIEUTENANT GOVERNOR OF THE STATE OF ALASKA, and STATE OF ALASKA, DIVISION OF ELECTIONS, Defendants.	Case No. 3AN-19-11106 CI

CERTIFICATE OF SERVICE

This is to certify that on February 10, 2020, true and correct copies of the **DEFENDANTS' ANSWER** and this **CERTIFICATE OF SERVICE** in the above-captioned matter were emailed and mailed via USPS, First Class, Postage Prepaid to the following:

Jon S. Wakeland
Brena, Bell & Walker, P.C
810 N Street, Suite 100
Anchorage, AK 99501
email: jwakeland@brenalaw.com

Robin O. Brena
Brena, Bell & Walker, P.C.
810 N Street, Suite 100
Anchorage, AK 99501
email: rbrena@brenalaw.com

Angela Hobbs, Law Office Assistant II

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Get the Facts!

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There's a lot of nonsense being published about the Fair Share Act and the issues that make it critical for our state. We didn't get into this fight without doing our homework.

+ Why is the Fair Share Act important to me?
+ What are the main features of the Fair Share Act?
+ Why should I support the Fair Share Act?

+ What is Alaskans' fair share?

+ Why aren't Alaskans getting a fair share now?

+ How are Alaskans doing compared with our producers from the sale of our oil?

+ Will the Fair Share Act create jobs for Alaskans?

+ Will the Fair Share Act help new producers and explorers?

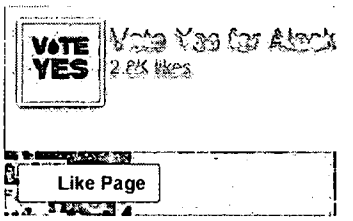
+ Please explain why the Fair Share Act benefits the right fields.

+ Please explain why existing law benefits the wrong fields.

+ Please explain how loopholes in the existing law will increase our current state deficit and are unfair to Alaskans and to new producers.

+ Please explain why Alaskans should receive a higher share (or progressive share) of oil revenues when the price of oil or producer profits increase?

+ Why is knowing the revenues, costs, and profits of our producers by field important



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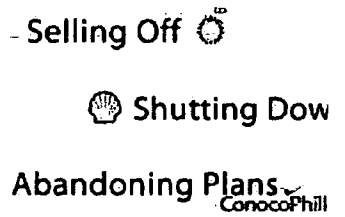

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You can volunteer to help Vote Yes for Alaska's Fair Share on our volunteer page of our webpage at https://www.voteyesforalaskasfairshare.com/volunteer or on our Facebook page at https://www.facebook.com/voteyesforalaskasfairshare/.

You can donate to Vote Yes for Alaska's Fair Share, a nonprofit organization, on our donation page of our webpage at https://www.voteyesforalaskasfairshare.com/donate.

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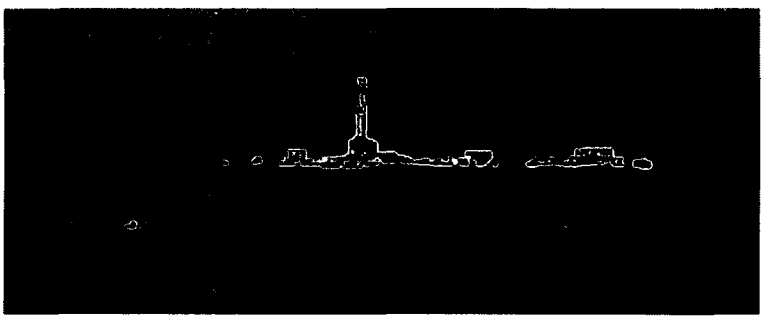

Alaska's fair share of oil revenue is foundation of fiscal plan

by Robin Brena

I recently suggested Alaskans should recover a fair share of our petroleum wealth. There have been several well-taken responses to my suggestion. The purpose for this article is to reply to those responses so we may continue an important conversation for Alaskans' futures.

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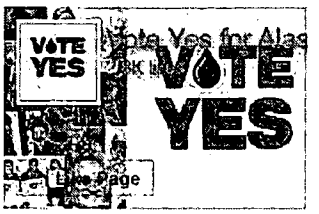
WHAT IS OUR FAIR SHARE?

Alaskans should receive one-third of the gross petroleum revenues being generated by the sale of our crude oil as our fair share. This one-third share has been the rough standard for revenue sharing since our vast petroleum wealth has been produced. Some responses did not accurately characterize my suggestion — it is simple, one-third of gross sales over time should be the standard we apply to determine if we are receiving our fair share.

To illustrate our one-third fair share by example, for 2017 the state has projected there will be 521,000 barrels per day sold at $56.24 per barrel (ANS West Coast). Based on these assumptions, there will be $10.7 billion in gross sales, and our fair share would be one-third of the gross sales or $3.6 billion in net petroleum revenues.

ARE WE GETTING OUR ONE-THIRD FAIR SHARE NOW?

We are not projected to get any net petroleum revenues after credits in 2017. To suggest we are currently getting our fair share when we are getting nothing cannot be taken seriously. In 2017, Alaskans are projected to receive $704.7 million in net petroleum revenues before credits, and Alaskans are projected to pay $760 million in credits. We will be paying $55.3 million to support an industry with $10.7 billion in gross revenues from the sale of our crude oil. This is not our fair share. In 2017, we should be receiving our historic one-third share or roughly $3.6 billion.



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SHOULD WE GET OUR ONE-THIRD FAIR SHARE WHEN PRICES ARE LOW?

We should have a long-term perspective and take our one-third fair share over time. In hard times, it makes sense to help out by taking somewhat less than one-third, so long as in good times, we take somewhat more than one-third. Progressive rates linked to crude oil prices will permit us to balance the good times and bad times fairly so we maintain our one-third average over time.

SHOULD WE GET OUR ONE-THIRD FAIR SHARE FROM EVERY OIL FIELD?

On average, we should receive our one-third fair share when all fields are considered. That said, when producers are exploring for new resource or developing marginal oil plays, it makes sense to take less than our one-third fair share from those fields, so long as when producers are simply harvesting major legacy fields, we take more than our one-third fair share. Lower minimum and progressive rates and the selective use of credits to support the exploration and development of new, marginal fields should be offset with additional revenues through higher minimum and progressive rates and no use of credits from the major legacy fields that are being harvested.

To illustrate this principle by example, Prudhoe Bay and Kuparuk are two of the largest legacy fields in North America. They are being harvested at very low cost. There has been real growth in the price of crude oil since these fields were developed. To achieve our one-third fair share overall, these two giant legacy fields should be paying us more than our one-third fair share so

we can support the development of new resource and marginal fields by taking less than one-third from them. These two giant legacy fields are among the largest and most profitable in North America and can support this approach.

By contrast, Caelus's Smith Bay field is 125 miles from the existing infrastructure and may contain up to 10 billion barrels of light oil in place and will need our support. Armstrong and Repsol have fields with an opportunity to add new resource and will need our support. Similarly, Conoco's heavy oil fields may well prove larger than Prudhoe and may need our support. These are oil plays that will add significant new resource and will benefit both the industry and Alaskans when they are developed. These fields should pay less than our one-third fair share, be eligible for and receive credits timely paid by the state, and should receive such other support as may be necessary to realize their full potential.

WILL GETTING OUR ONE-THIRD FAIR SHARE COST ALASKA JOBS?

No. While we may lose a few jobs in some areas, getting our fair share will save many more Alaska jobs than it will cost. If we get our fair share, the money will stay in Alaska. If we do not get our fair share, the money, for the most part, will leave Alaska. One billion more dollars in petroleum revenues from the Prudhoe field could support 10,000 Alaska jobs at $100,000 per year and would have a much more positive effect on jobs in Alaska than would that same billion dollars being used for projects or distributed to shareholders in other parts of the world. The bottom line is that taking less than our fair share is costing Alaskans jobs.

Generally, regardless of the price of oil, the three major producers are cutting jobs and harvesting resource rather than adding jobs and exploring for new resource. BP, for example, is cutting jobs

and harvesting Prudhoe and was doing so when the price of oil was $150 per barrel. Exxon falls in the same general category as BP and only added jobs to develop Pt. Thompson when forced by the state. Conoco has a better track record than BP and Exxon, but is cutting jobs overall while harvesting some fields and deferring projects at other fields, but it is also investing in new resource at yet other fields. In general, regardless of oil price, the three majors will continue to provide the minimum jobs necessary to harvest our resource whether we get our fair share or not.

DOES SUPPORTING OUR ONE-THIRD FAIR SHARE MEAN WE ARE AGAINST THE PETROLEUM INDUSTRY IN ALASKA?

Of course not. The petroleum industry is staffed with good and capable Alaskans who have had an essential role in building a modern Alaska. The industry's exploration and development of our petroleum resources is also essential to the future of Alaska. In fact, most of the time, the things that are good for the petroleum industry are also good for Alaska.

That said, some of the time, what may be good for the three major producers is not good for independent producers, for other companies within the petroleum industry, or for Alaska. To give just a few of many examples:

1. The three major producers' affiliated transportation companies were driving independent producers out of Alaska, undermining refiners in Alaska, and underpaying the state almost $500 million per year in production revenues by overcharging transportation rates on the Trans Alaska

Pipeline System. These three majors were making greater than 100 percent return on equity each year, and it took years of litigation to get fair rates.

2. These same affiliated transportation companies later claimed the assessed value of TAPS was less than 10 percent of its full and true value in a coordinated effort to underpay their property taxes, and it took years of litigation to get fair property taxes.

3. They have also entered into cost pooling agreements, which prevent them from having to compete with each other to transport oil from the North Slope.

4. Last year, they worked to discontinue credits for independent producers that were more deserving of the support to preserve their own credits.

These are not isolated examples. They are used to illustrate a simple principle — Alaskans have to stand up for what is good for the development of our natural resources, as required by our constitution, even when it means requiring the three major producers to pay their fair share and treat other petroleum companies and Alaskans fairly.

CAN WE BALANCE THE BUDGET SOLELY WITH OUR ONE-THIRD FAIR SHARE?

No, we will need cuts in state government and additional revenues to balance the budget. That said, we should not be raising taxes on Alaskans, accessing our Permanent Fund and savings, reducing PFDs, or cutting state and municipal jobs to make up for not getting our fair share.

To use 2017 as an example, we will have roughly a $4.8 billion budget. With gross crude oil sales of $10.7 billion, our fair share would be $3.6 billion. Assuming we pay $0.5 billion in credits to support those oil fields that need our support, we will have net petroleum revenues after credits of $3.1 billion and a budget deficit of $1.7 billion ($4.8 billion budget less $3.1 billion in net petroleum revenues after credits).

Managing a $1.7 billion deficit is possible given rational choices. We could cut state government for $0.5 billion, pass a statewide income or sales tax for $0.6 billion, and draw down our savings or cap the PFDs at $1,000 per person for the last $0.6 billion. This approach would start with our fair share, cut government, raise statewide taxes, preserve sustainable PFDs, and minimize the impact on our savings and Permanent Fund.

If someone you know disagrees with this approach, then ask them for their approach for addressing the $4.8 billion deficit for 2017. Then decide which plan you like best. Whatever you do, do not be swayed by people trying to justify taking less than our one-third fair share when they do not have a plan to balance the budget. Any plan to balance the budget without our fair share of petroleum revenues will devastate our economy and require Alaskans to pay a lot more out of our pockets and a lot more money out of our children's and grandchildren's pockets than is fair.

Robin Brena *is an oil and gas attorney who has represented several independent producers, value-added manufacturers, and municipalities on oil and gas matters as well as served as the chairman of the Oil and Gas Subcommittee for the Walker transition team. He also is a major contributor to the political group Together for Alaska.*

October 24th, 2016

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Alaska's Oil Production Tax is Broken

by Robin Brena

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Part One

As owners, we Alaskans are entitled to one-third of the gross revenues from the sale of our oil. We realize our fair share through a combination of revenues from a production tax, royalty payments, income taxes and real property taxes.
Production taxes are the most critical. In 2012, for example, production revenues were responsible for $6.1 billion (60 percent of total petroleum revenues).

Our production tax is broken and no longer helps us realize our fair share as owners. In 2017, production revenues will be only $0.1 billion (8 percent of total petroleum revenues). This article will discuss our current production tax, how to fix it and how to test if it is working.

CONSTITUTIONAL OBLIGATION

Article 8, Section 2 of the Alaska Constitution provides, "The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people." Thus, our Legislature has a constitutional duty to provide the maximum benefit for all Alaskans from our oil. The production tax is the primary manner in which the Legislature has historically undertaken to fulfill this constitutional duty.

THE DEAL

The late Jay Hammond was our governor from 1974 through 1982 — the period when the Trans-Alaska Pipeline System and much of the infrastructure for the production of our major legacy fields were built. Hammond was perhaps the single person most familiar with the original deal under which our oil resources came into production.

Hammond was clear what portion of our oil resources represented our fair share as owners. To quote him directly from the chapter "A Broken Bargain" from his book "Diapering the Devil," "When I was in office, the state, the oil companies, and the federal government agreed to split the oil wealth pie roughly one-third, one-third, and one-third."

When Alaskans received less than one-third of the gross value for our oil, Gov. Hammond believed Alaskans were being "shortchanged hundreds of millions of dollars each year for the past several years and will continue to be denied what was once agreed to be our 'fair share.' " The year he said Alaskans were being "shortchanged" was 2004, a year when he calculated Alaskans received only 27 percent of the gross revenues from the sale of our oil.

The production tax is the primary means through which we are able to realize our fair share as owners. When considered with the other mechanisms for the recovery of our fair share, the production tax should be adjusted so the total net petroleum revenues equal one-third the gross market value of our oil.

HISTORY OF PETROLEUM REVENUES

Since 1978, Alaska has exported crude oil with a gross market value of $527 billion and received $141 billion in petroleum revenue — or 27 percent of gross revenue. Stated differently, from 1978 to date, we have undercollected our one-third ownership share by $35 billion — or 6 percent of gross revenue. This overall undercollection was what Hammond was referring to when he said Alaskans were being "shortchanged." This undercollection is primarily due to the failure of the production taxes to recover our fair share as owners.

COLLAPSE OF PETROLEUM REVENUES

Our petroleum revenues have completely collapsed, and Alaskans are getting less for their petroleum resources than at any time in our history. Total net petroleum revenues from all sources have

collapsed from $9.2 billion (2012) to $0.8 billion (2017) — or by 91 percent. The total net unrestricted petroleum revenues (which may be more readily used to reduce the massive current deficit) have similarly collapsed from $8.1 billion (2012) to $0.2 billion (2017) — or by 98 percent.

FAILURE OF THE PRODUCTION TAX

A primary reason for this collapse in petroleum revenues is the failure of the production tax to realize our fair share as owners. Total petroleum revenues under our production tax have collapsed from $6.1 billion (2012) to $0.1 billion (2017) — or by 98 percent. Net petroleum revenues under our production tax have collapsed even more, from $5.4 billion (2012) to -$0.5 billion (2017) — or by 109 percent. This decline in net petroleum revenues under the production **tax is illustrated in the chart below:**

For the first time in our history, Alaskans are paying the producers to produce our crude oil under our production tax. Our production tax is not even bringing in sufficient net revenues to timely pay the petroleum credits we are incurring under it.

Some choose to attribute this entire revenue collapse to the decline in the price of crude oil. As the price of crude oil declines, so will gross revenues and our fair share of those gross revenues. Unfortunately, revenues under the production tax declined much more than the decline in the price of crude oil. Our net production tax revenues declined from $5.4 billion (2012) to -$0.5 billion (2017) — or by 109 percent while the price of crude oil only declined from $112.65 per barrel (2016) to $43.18 per barrel — or by 62 percent. If our net production tax revenues had declined proportionally to the decline in the price of crude oil, the $5.7

billion in net production tax revenues would have declined 62 percent to $2.2 billion rather than to -$0.5 billion.

In 2016, Alaska produced 531,500 barrels per day at an average price of $43.18 per barrel (ANS West Coast) — or $8.4 billion in total gross market revenues. Our share of this $8.4 billion should have been one-third of the gross market value — or $2.8 billion. Instead, we recovered a net of $0.9 billion (total petroleum revenues from all sources less credits incurred) — or $1.9 billion less than our fair share as owners. Stated differently, collecting one-third of the gross market value for our crude oil through an appropriate production tax would have increased our petroleum revenues by $1.9 billion and cut our deficit roughly in half.

HOW BEST TO FIX THE PRODUCTION TAX

There are several ways to improve our current production tax, and I have detailed them in prior articles and testimony.

In general, going to a simple progressive gross-market tax with adjustments upward for the lower-cost major legacy fields and downward for the higher-cost minor fields would be the best solution.

If the Legislature is unable to adopt the best solution, the existing production tax could be improved through simply (1) raising the minimum tax for the Prudhoe and Kuparuk fields; (2) hardening the minimum floor so credits, new oil designations and loss carry-forwards may not avoid it; (3) restricting the definition of new oil and eliminating Point Thompson from the definition, (4) requiring and resourcing timely audits coupled with appropriate interest on underpayments, and (5) eliminating unnecessary credits while paying the necessary credits. That said, Alaskans have always

gotten and will always get the short end of the stick under the complex revenue system we have in place today.

A SIMPLE TEST

Under any approach to fixing the production tax, the primary test to determine whether it is working is simple. If the production tax when added to our other sources of petroleum revenues (royalty, income and property revenues) results in Alaskans receiving one-third of the gross market revenue from the sale of our crude oil, then the production tax works. To apply this test is also simple: Multiply the barrels of crude oil produced in a year with the ANS West Coast price and divide by three. Then, check to be sure the revenues we received from all sources (production, royalty, income and property) equal this one-third.

Part Two

In Part One of this commentary, I explained the collapse of our production tax structure and suggested ways to correct and test it to be sure it is working. Here in Part Two, I will directly address the primary arguments suggesting we should take less than our fair share.

INEFFICIENT STATE SPENDING

Some suggest we should take less because the state government is spending wastefully. Alaskans should disagree. As the owners of our oil, we should recover our fair share whether the state spends wisely or foolishly.

OVER-TAXATION

Some suggest the oil industry is being overtaxed. Alaskans should disagree. Alaskans are entitled to a one-third fair share as owners of the oil – getting our share is not a taxation issue but a question of ownership and stewardship.

HEALTH OF THE MAJOR PRODUCERS

Some suggest we take less for the health of three major producers. Alaskans should disagree. The three major producers have made and are continuing to make substantial profits from our oil while we forgo billions of our fair share as owners and spend billions of our savings. It is time for our primary concern to turn to the health of the state, the economy, independent producers, and other industries.

Moreover, property-related taxes, such as a production tax, should be paid regardless of claimed profitability. This is why every other oil state has a production tax based on gross revenues rather than on net revenues.

We also need sufficient petroleum revenues to efficiently support a viable and competitive oil industry with independent producers. Currently, our revenues used to give the oil industry incentive are being massively misallocated – we need more support for independent producers willing to explore for additional resources and less support for the three major producers harvesting Prudhoe and Kuparuk.

Finally, there is a natural evolution of an oil-producing region such as the North Slope. Major producers with higher cost structures often build out the initial infrastructure and capture the largest fields in an oil region. Over time, as field economics become more

challenging, there is a natural progression to producers with lower cost structures. We should not have a net production tax that discourages this natural evolution and rewards the highest-cost majors for indefinitely harvesting our major legacy fields to fund projects outside of Alaska.

HIGH COSTS OF PRODUCTION

Some suggest we should take less because the cost of production in Alaska is too high. Alaskans should disagree. Alaskans should not take the risks associated with the three major producers' costs. The major producers are best able to manage their own costs and should bear the risks of not managing them prudently. Further, the three major producers are among the highest cost-producers in the world. Alaskans should not take less due to their inefficient spending.

In addition, the major producers' claimed costs are not reliable. Their claimed costs have not been audited; they average costs, which shields the true profitability of the low-cost major legacy fields such as Prudhoe and Kuparuk; and their claimed costs include substantial costs that are improper.

Additionally, their claimed costs include excessive and noncompetitive payments to their own profit centers. For example, they deduct the payments to themselves for the transportation of our oil through their pipelines and tankers. These payments to themselves are excessive and noncompetitive. To give one of many possible examples, the Regulatory Commission of Alaska has held that from 1977 through 1996, the major producers over-collected $13.5 billion in excess profits. This entire $13.5 billion in excess profits was claimed as costs of production and improperly deducted from their production taxes. Such excessive and noncompetitive payments by the three majors

to themselves should not be deducted from their production taxes. In short, Alaskans need to understand that costs are not always costs, but are often additional profits, when dealing with the three major integrated producers.

BENEFITS OF SB21

Some suggest we should take less because of the benefits of Senate Bill 21, the current tax regime. Some suggest this year SB21 is bringing in $100 million more than ACES, the previous tax regime. Alaskans should disagree.

For different reasons, neither SB21 nor ACES perform well at lower oil prices. Both would have to be significantly modified to realize our fair share under lower oil prices. Further, while ACES brings in a little less than SB21 during periods of lower oil prices, ACES brings in a lot more than SB21 during periods of higher oil prices. Comparing the revenues that would have been generated under SB21 and ACES from 2007 to date reveals ACES would have collected $11 billion more. Essentially, for every $1 more in revenue SB21 is bringing in this year, it will cost us $100 in revenue over time.

Some suggest SB21 has resulted in more production. But SB21 is not the cause of increased production – the gain of a few thousand barrels per day is the result of projects under development for years if not decades before SB21 passed into law.

ALASKANS VOTED

Some suggest we should take less because Alaskans voted not to repeal SB21. Alaskans should disagree. The vote came before the price of oil declined and it became obvious how poorly SB21 performs in periods of lower oil prices.

The vote was also based upon representations of new jobs and substantially increased production. Neither of those representations has proven true. Jobs have substantially declined, and SB21 has had no significant impact on production.

Under SB21, we are forgoing several billion dollars of our fair share in annual revenues to incentivize the three majors to do what they are already legally obligated to do under their leases – develop and produce our oil. Instead, Alaskans should demand they honor their lease commitments. Ironically, we are doing such a poor job of incentivizing additional investment that we would be much better off to simply get our fair share and give all of it back to the oil industry for capital projects in Alaska. This would be much better than allowing billions to simply leave Alaska in the hope the majors will leave some part of our fair share in Alaska.

Finally, we simply cannot do any worse at protecting our interests. If the Legislature is unable to find the political will to pass a reasonable production tax, perhaps it is time for Alaskans to vote again. This vote should be first on Alaskans' legislators and second on whether to adopt a simple progressive production tax based on our fair share of one-third of the gross market sales.

CONCLUSION

Alaskans need to be clear – there are only three potential sources of revenues to close our massive annual $3.5 billion deficit: 1. three major international producers (through an increased production tax); 2. us (through an income tax, sales tax, user fees, and reduced dividends); or 3. our children (through the Permanent Fund). While we may need some combination of these three sources, Alaskans should be clear that recovering our fair share should be the first place we look, not the last.

Former Gov. Jay Hammond anticipated this dilemma and was also clear that before Alaskans should agree to user fees or a broad-

based sales or income tax (much less use the Permanent Fund earnings or dividends), we should first ensure we are recovering one-third of the gross value for our oil. Specifically, he stated, "(F)irst, oil taxes should be adjusted to redeem the State's initially agreed upon one-third share. Only then should user fees or a broad based sales or income tax be imposed if we lack sufficient revenues to fund essential government services." Alaskans should agree.

March 20th, 2017

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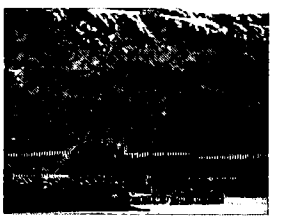

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ANCHORAGE DAILY NEWS

ConocoPhillips employees steer Alaska oil tax cut bill through Legislature

Author: Pat Forgey Updated: September 27, 2016 Published March 27, 2013

JUNEAU -- A push to cut oil industry taxes in Alaska has had its path through the Legislature cleared by a series of friendly committee chairs who, despite Alaska's lax rules against conflict of interest, have strong ties to companies that stand to benefit from the billions of dollars at stake.

Senate Bill 21 would cut oil taxes an estimated $5 to $6 billion over six years, given projected prices and production levels. That would all-but guarantee several years of deficit spending.

Legislative leaders who support a tax cut on oil companies doing business in Alaska have appointed industry-friendly committee chairs and then sent the bill through those committees, resulting in ConocoPhillips vice presidents appearing before legislative committees chaired by ConocoPhillips employees.

As it turned out, ConocoPhillips employees serving as legislators agreed with the ConocoPhillips vice presidents that taxes on oil production need to be curtailed.

ConocoPhillips is the single largest oil producer in the state of Alaska.

Micciche is ConocoPhillips superintendent

First, Senate Bill 21 went to the Senate's Special Committee on TAPS Throughput. That committee was chaired during the bill's consideration by Sen. Peter Micciche, R-Soldotna. He is an employee of ConocoPhillips, working as superintendent of ConocoPhillips' Kenai LNG facility. His salary last year was between $100,000 and $200,000. Micciche has a co-chair, Sen. Mike Dunleavy, R-Wasilla, but Micciche decided to personally handle the bill debate.

Next, Senate Bill 21 went to the Senate Resources Committee, chaired by Sen. Cathy Giessel, R-Anchorage. Giessel is married to Richard S. Giessel, who manages R&M Consulting's Construction Services business. The

company touts its petroleum ties on the firm's website, starting with construction of the trans-Alaska pipeline and continuing with recent work on various gas pipeline proposals.

Cathy Giessel's financial disclosure forms show Richard Giessel was paid between $200,000 and $500,000 last year.

Third, the bill went to the Senate Finance Committee led by Sen. Kevin Meyer, R-Anchorage, during the bill hearings. Meyer works for ConocoPhillips and takes a leave of absence during the legislative session. Meyer's state financial disclosures show he made $50,000-$100,000 last year working for ConocoPhillips when the legislature wasn't in session. Meyer has a co-chair, but he, too, personally handled the bill debate.

After Senate Bill 21 passed the full Senate by a vote of 11-9, with Micciche, Giessel and Meyer voting in favor, it went to the House of Representatives.

Now in the House, Senate Bill 21 is being heard by the House Resources Committee, chaired by Rep. Eric Feige, R-Chickaloon. He's a pilot who has flown oil-industry passengers to the North Slope. He's married to Corri Feige, the Alaska manager for Linc Energy, which is developing the Umiat oil field, helped by state incentives. His financial disclosures show Corri Feige was paid between $100,000 and $200,000. Eric Fiege has a co-chair as well, but he's personally handled the bill debate.

Conflict or perceived conflict?

In the Alaska Legislature, committee chairs have extensive authority to either hinder bills or hurry them along, including choosing whether to hear them at all.

Even when legislators work directly for industries, they're sometimes reluctant to acknowledge conflicts of interest. Despite working directly for ConocoPhillips, Meyer has been unwilling to acknowledge a conflict of interest, admitting only to a "perceived conflict of interest" from his "employment outside the Legislature."

The company Meyer didn't name is ConocoPhillips, one of those urging Alaska to lower taxes and promising additional development if taxes are lowered far enough. Meyer describes himself as a professional employee of the company but not one who works at the management-level.

The issue of who chaired the Finance Committee during oil tax negotiations has come up once before during a critical oil tax debate. When ACES was adopted in 2007, Meyer was a co-chair of the House Finance Committee. In that instance, he turned over the gavel to his co-chair.

Then-Speaker John Harris, R-Valdez, said that it would not have been appropriate for Meyer to run oil tax meetings.

"There isn't any doubt that Kevin Meyer has to step down from chairing anything," Harris said at the time.

Meyer said he considered handing over the gavel this year as well. He suggested that to his co-chair and found him unenthusiastic.

"You know much more about oil and gas than I do," Meyer said co-chair Sen. Pete Kelly, R-Fairbanks, told him. So Meyer chaired the meetings himself.

In any event, Meyer said, committee chairs aren't all that important.

"As chairman, you are basically just facilitating," he said. "Your vote in the committee is not really the vote that counts. The vote that counts is the vote on the floor."

When Senate Bill 21 came to the Senate floor last week, Meyer noted his "perceived conflict of interest" and asked to be recused from voting.

Under legislative rules, if even one senator objected, Meyer would be required to vote. There were multiple objections, and Meyer cast what might have been the deciding vote in favor of a bill that could be worth up to $2 billion to his company.

Micciche made a similar recusal request, noting that he had "an employer in the natural gas industry." With a vote as close as SB 21, which passed 11-9, losing the votes of Meyer, Micciche, or any of those with conflicts, would have caused the tax cut to fail.

Meyer denies that his job with ConocoPhillips constitutes a conflict of interest, though he acknowledged others might see it differently. And he supports the method the Legislature uses, in which both he and Micciche announced their conflicts and asked to be recused from voting. Neither Meyer or Micciche said they objected when the other sought recusal.

The alternative to voting, said Meyer, would mean that his 70,000 constituents would lose their voice on an important bill. "You'd have a population the size of Fairbanks being totally disenfranchised down in Juneau," he said.

French: Price of a citizen legislature

In a state the size of Alaska with part-time legislators, conflicts of interest are inevitable, he said. "We are citizen legislators, everyone's going to have a conflict from time to time," he said.

There is also debate over what is and is not a conflict of interest. Under legislative rules, the jobs of spouses aren't currently considered conflicts of interest.

Sen. Hollis French, D-Anchorage, voted the opposite way from Meyer and Micciche, but said there is nothing wrong with them voting on oil issues.

"As uncomfortable as it looks, it is a citizen legislature, and in a state the size of Alaska that's going to happen," he said.

As long as the conflicts are disclosed, and Micciche, Meyer and others have been scrupulous about noting even potential conflicts, French said the process is working.

But House Minority Leader Beth Kerttula, D-Juneau, said the state's ethics process needs fixing.

"When you get your paycheck from a company, that's a clear and substantial impact," she said. "I think our rules should change, and I've felt that way for a long time."

She said Meyer and Micciche are clearly following the rules, but the rules should be changed. "There's nothing (illegal) about it, but it doesn't mean they should be doing it," Kerttula said. "They need to be clear ... and they need to spell out that when you have a direct conflict of interest, you recuse yourself," she said.

If Senate Bill 21 reaches the House floor, more representatives married to oil-industry employees will await it. Both Rep. Mike Hawker, R-Anchorage, and Lora Reinbold, R-Eagle River, are married to ConocoPhillips employees.

House Speaker Mike Chenault, R-Nikiski, has roots in the oil industry but his oilfield services company, Qwick Construction, is not now active. He said he may resume doing such work in the future, but he said it was too difficult to run a small business while he was serving in the Legislature.

If the bill passed both houses, it would then go to Gov. Sean Parnell to be signed or vetoed. He is a former lobbyist for ConocoPhillips.

Contact Pat Forgey at pat(at)alaskadispatch.com

Comments

SENATE BILL NO. 129

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTY-FIRST LEGISLATURE - SECOND SESSION

BY SENATOR WIELECHOWSKI

Introduced: 1/21/20
Referred: Resources, Finance

A BILL

FOR AN ACT ENTITLED

"An Act relating to the oil and gas production tax; relating to credits against the oil and gas production tax; relating to payments of the oil and gas production tax; relating to lease expenditures and adjustments to lease expenditures; making public certain information related to the oil and gas production tax; relating to the Department of Revenue; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 40.25.100(a) is amended to read:

(a) Information in the possession of the Department of Revenue that discloses the particulars of the business or affairs of a taxpayer or other person, including information under AS 38.05.020(b)(11) that is subject to a confidentiality agreement under AS 38.05.020(b)(12), is not a matter of public record, except as provided in **AS 43.05.230(i) - (m)** [AS 43.05.230(i) - (*l*)] or for purposes of investigation and law enforcement. The information shall be kept confidential except when its production is

required in an official investigation, administrative adjudication under AS 43.05.405 - 43.05.499, or court proceeding. These restrictions do not prohibit the publication of statistics presented in a manner that prevents the identification of particular reports and items, prohibit the publication of tax lists showing the names of taxpayers who are delinquent and relevant information that may assist in the collection of delinquent taxes, or prohibit the publication of records, proceedings, and decisions under AS 43.05.405 - 43.05.499.

*** Sec. 2.** AS 43.05.230 is amended by adding a new subsection to read:

(m) The information provided by a producer to the department on a return for the payment of oil production taxes assessed under AS 43.55.011(q) is public information.

*** Sec. 3.** AS 43.55.011(e) is amended to read:

(e) There is levied on the producer of oil or gas a tax for all oil and gas produced each calendar year from each lease or property in the state, less any oil and gas the ownership or right to which is exempt from taxation or constitutes a landowner's royalty interest or for which a tax is levied by AS 43.55.014. Except as otherwise provided under (f), (j), (k), (o), [AND] (p)**, (q), and (s)** of this section, for oil and gas produced

(1) before January 1, 2014, the tax is equal to the sum of

(A) the annual production tax value of the taxable oil and gas as calculated under AS 43.55.160(a)(1) multiplied by 25 percent; and

(B) the sum, over all months of the calendar year, of the tax amounts determined under (g) of this section;

(2) on and after January 1, 2014, and before January 1, 2022, the tax is equal to the annual production tax value of the taxable oil and gas as calculated under AS 43.55.160(a)(1) multiplied by 35 percent;

(3) on and after January 1, 2022, the tax for

(A) oil is equal to the annual production tax value of the taxable oil as calculated under AS 43.55.160(h) multiplied by 35 percent;

(B) gas is equal to 13 percent of the gross value at the point of production of the taxable gas; if the gross value at the point of production of

gas produced from a lease or property is less than zero, that gross value at the point of production is considered zero for purposes of this subparagraph.

*** Sec. 4.** AS 43.55.011(f) is amended to read:

(f) The levy of tax under (e) of this section for

(1) oil and gas produced before January 1, 2022, from leases or properties that include land north of 68 degrees North latitude, other than gas subject to (o) of this section **and oil subject to (q) of this section**, may not be less than

(A) four percent of the gross value at the point of production when the average price per barrel for Alaska North Slope crude oil for sale on the United States West Coast during the calendar year for which the tax is due is more than $25;

(B) three percent of the gross value at the point of production when the average price per barrel for Alaska North Slope crude oil for sale on the United States West Coast during the calendar year for which the tax is due is over $20 but not over $25;

(C) two percent of the gross value at the point of production when the average price per barrel for Alaska North Slope crude oil for sale on the United States West Coast during the calendar year for which the tax is due is over $17.50 but not over $20;

(D) one percent of the gross value at the point of production when the average price per barrel for Alaska North Slope crude oil for sale on the United States West Coast during the calendar year for which the tax is due is over $15 but not over $17.50; or

(E) zero percent of the gross value at the point of production when the average price per barrel for Alaska North Slope crude oil for sale on the United States West Coast during the calendar year for which the tax is due is $15 or less; and

(2) oil produced on and after January 1, 2022, from leases or properties that include land north of 68 degrees North latitude, **other than oil subject to (q) of this section,** may not be less than

(A) four percent of the gross value at the point of production

when the average price per barrel for Alaska North Slope crude oil for sale on the United States West Coast during the calendar year for which the tax is due is more than $25;

(B) three percent of the gross value at the point of production when the average price per barrel for Alaska North Slope crude oil for sale on the United States West Coast during the calendar year for which the tax is due is over $20 but not over $25;

(C) two percent of the gross value at the point of production when the average price per barrel for Alaska North Slope crude oil for sale on the United States West Coast during the calendar year for which the tax is due is over $17.50 but not over $20;

(D) one percent of the gross value at the point of production when the average price per barrel for Alaska North Slope crude oil for sale on the United States West Coast during the calendar year for which the tax is due is over $15 but not over $17.50; or

(E) zero percent of the gross value at the point of production when the average price per barrel for Alaska North Slope crude oil for sale on the United States West Coast during the calendar year for which the tax is due is $15 or less.

*** Sec. 5.** AS 43.55.011 is amended by adding new subsections to read:

(q) There is levied on the producer of oil or gas a tax for all oil produced from each major oil field each month of the calendar year, less any oil and gas the ownership or right to which is exempt from taxation or constitutes a landowner's royalty interest. For oil produced from a major oil field on and after January 1, 2021, the tax is equal to the sum of

(1) the annual production tax value of the taxable oil from the major oil field as calculated under AS 43.55.160(h)(5) or (i)(8), as applicable, multiplied by 35 percent; and

(2) the sum, over all months of the calendar year, of the tax amounts determined under (r) of this section.

(r) For each month of a calendar year for which the average monthly

production tax value under AS 43.55.160(j) of a barrel of taxable oil produced from each major oil field is more than $50, the amount of additional tax for purposes of (q)(2) of this section is determined by multiplying

(1) the monthly production tax value of the taxable oil produced by the producer from the major oil field during the month, less $50; and

(2) the tax rate of 15 percent.

(s) For each month of the calendar year, the levy of tax under (q) of this section for oil produced from each major oil field may not be less than

(1) 10 percent of the gross value at the point of production from the major oil field when the average price per barrel for Alaska North Slope crude oil for sale on the United States West Coast during the month for which the tax is due is less than $50;

(2) 11 percent of the gross value at the point of production from the major oil field when the average price per barrel for Alaska North Slope crude oil for sale on the United States West Coast during the month for which the tax is due is $50 or more but less than $55;

(3) 12 percent of the gross value at the point of production from the major oil field when the average price per barrel for Alaska North Slope crude oil for sale on the United States West Coast during the month for which the tax is due is $55 or more but less than $60;

(4) 13 percent of the gross value at the point of production from the major oil field when the average price per barrel for Alaska North Slope crude oil for sale on the United States West Coast during the month for which the tax is due is $60 or more but less than $65;

(5) 14 percent of the gross value at the point of production from the major oil field when the average price per barrel for Alaska North Slope crude oil for sale on the United States West Coast during the month for which the tax is due is $65 or more but less than $70; or

(6) 15 percent of the gross value at the point of production from the major oil field when the average price per barrel for Alaska North Slope crude oil for sale on the United States West Coast during the month for which the tax is due is $70

or more.

(t) A tax credit provided under this chapter may not be applied to reduce an amount due under (s) of this section.

*** Sec. 6.** AS 43.55.019(a) is amended to read:

(a) A producer of oil or gas is allowed a credit against the tax levied by **AS 43.55.011** [AS 43.55.011(e)] for contributions of cash or equipment accepted for

(1) direct instruction, research, and educational support purposes, including library and museum acquisitions, and contributions to endowment, by an Alaska university foundation or by a nonprofit, public or private, Alaska two-year or four-year college accredited by a national or regional accreditation association;

(2) secondary school level vocational education courses, programs, and facilities by a school district in the state;

(3) vocational education courses, programs, equipment, and facilities by a state-operated vocational technical education and training school, a nonprofit regional training center recognized by the Department of Labor and Workforce Development, and an apprenticeship program in the state that is registered with the United States Department of Labor under 29 U.S.C. 50 - 50b (National Apprenticeship Act);

(4) a facility by a nonprofit, public or private, Alaska two-year or four-year college accredited by a national or regional accreditation association;

(5) Alaska Native cultural or heritage programs and educational support, including mentoring and tutoring, provided by a nonprofit agency for public school staff and for students who are in grades kindergarten through 12 in the state;

(6) education, research, rehabilitation, and facilities by an institution that is located in the state and that qualifies as a coastal ecosystem learning center under the Coastal America Partnership established by the federal government; and

(7) the Alaska higher education investment fund under AS 37.14.750.

*** Sec. 7.** AS 43.55.019(e) is amended to read:

(e) The credit under this section may not reduce a person's tax liability under **AS 43.55.011** [AS 43.55.011(e)] to below zero for any tax year. An unused credit or portion of a credit not used under this section for a tax year may not be sold, traded,

transferred, or applied in a subsequent tax year.

* **Sec. 8.** AS 43.55.020(a) is amended to read:

(a) For a calendar year, a producer subject to tax under AS 43.55.011 shall pay the tax as follows:

(1) for oil and gas produced before January 1, 2014, an installment payment of the estimated tax levied by AS 43.55.011(e), net of any tax credits applied as allowed by law, is due for each month of the calendar year on the last day of the following month; except as otherwise provided under (2) of this subsection, the amount of the installment payment is the sum of the following amounts, less 1/12 of the tax credits that are allowed by law to be applied against the tax levied by AS 43.55.011(c) for the calendar year, but the amount of the installment payment may not be less than zero:

(A) for oil and gas not subject to AS 43.55.011(o) or (p) produced from leases or properties in the state outside the Cook Inlet sedimentary basin, other than leases or properties subject to AS 43.55.011(f), the greater of

(i) zero; or

(ii) the sum of 25 percent and the tax rate calculated for the month under AS 43.55.011(g) multiplied by the remainder obtained by subtracting 1/12 of the producer's adjusted lease expenditures for the calendar year of production under AS 43.55.165 and 43.55.170 that are deductible for the oil and gas under AS 43.55.160 from the gross value at the point of production of the oil and gas produced from the leases or properties during the month for which the installment payment is calculated;

(B) for oil and gas produced from leases or properties subject to AS 43.55.011(f), the greatest of

(i) zero;

(ii) zero percent, one percent, two percent, three percent, or four percent, as applicable, of the gross value at the point of production of the oil and gas produced from the leases or properties

during the month for which the installment payment is calculated; or

(iii) the sum of 25 percent and the tax rate calculated for the month under AS 43.55.011(g) multiplied by the remainder obtained by subtracting 1/12 of the producer's adjusted lease expenditures for the calendar year of production under AS 43.55.165 and 43.55.170 that are deductible for the oil and gas under AS 43.55.160 from the gross value at the point of production of the oil and gas produced from those leases or properties during the month for which the installment payment is calculated;

(C) for oil or gas subject to AS 43.55.011(j), (k), or (o), for each lease or property, the greater of

(i) zero; or

(ii) the sum of 25 percent and the tax rate calculated for the month under AS 43.55.011(g) multiplied by the remainder obtained by subtracting 1/12 of the producer's adjusted lease expenditures for the calendar year of production under AS 43.55.165 and 43.55.170 that are deductible under AS 43.55.160 for the oil or gas, respectively, produced from the lease or property from the gross value at the point of production of the oil or gas, respectively, produced from the lease or property during the month for which the installment payment is calculated;

(D) for oil and gas subject to AS 43.55.011(p), the lesser of

(i) the sum of 25 percent and the tax rate calculated for the month under AS 43.55.011(g) multiplied by the remainder obtained by subtracting 1/12 of the producer's adjusted lease expenditures for the calendar year of production under AS 43.55.165 and 43.55.170 that are deductible for the oil and gas under AS 43.55.160 from the gross value at the point of production of the oil and gas produced from the leases or properties during the month for which the installment payment is calculated, but not less than zero; or

(ii) four percent of the gross value at the point of

production of the oil and gas produced from the leases or properties during the month, but not less than zero;

(2) an amount calculated under (1)(C) of this subsection for oil or gas subject to AS 43.55.011(j), (k), or (o) may not exceed the product obtained by carrying out the calculation set out in AS 43.55.011(j)(1) or (2) or 43.55.011(o), as applicable, for gas or set out in AS 43.55.011(k) for oil, but substituting in AS 43.55.011(j)(1)(A) or (2)(A) or 43.55.011(o), as applicable, the amount of taxable gas produced during the month for the amount of taxable gas produced during the calendar year and substituting in AS 43.55.011(k) the amount of taxable oil produced during the month for the amount of taxable oil produced during the calendar year;

(3) an installment payment of the estimated tax levied by AS 43.55.011(i) for each lease or property is due for each month of the calendar year on the last day of the following month; the amount of the installment payment is the sum of

(A) the applicable tax rate for oil provided under AS 43.55.011(i), multiplied by the gross value at the point of production of the oil taxable under AS 43.55.011(i) and produced from the lease or property during the month; and

(B) the applicable tax rate for gas provided under AS 43.55.011(i), multiplied by the gross value at the point of production of the gas taxable under AS 43.55.011(i) and produced from the lease or property during the month;

(4) any amount of tax levied by AS 43.55.011, net of any credits applied as allowed by law, that exceeds the total of the amounts due as installment payments of estimated tax is due on March 31 of the year following the calendar year of production;

(5) for oil and gas produced on and after January 1, 2014, and before **January 1, 2021** [JANUARY 1, 2022], an installment payment of the estimated tax levied by AS 43.55.011(e), net of any tax credits applied as allowed by law, is due for each month of the calendar year on the last day of the following month; except as otherwise provided under (6) of this subsection, the amount of the installment payment

is the sum of the following amounts, less 1/12 of the tax credits that are allowed by law to be applied against the tax levied by AS 43.55.011(e) for the calendar year, but the amount of the installment payment may not be less than zero:

(A) for oil and gas not subject to AS 43.55.011(o) or (p) produced from leases or properties in the state outside the Cook Inlet sedimentary basin, other than leases or properties subject to AS 43.55.011(f), the greater of

(i) zero; or

(ii) 35 percent multiplied by the remainder obtained by subtracting 1/12 of the producer's adjusted lease expenditures for the calendar year of production under AS 43.55.165 and 43.55.170 that are deductible for the oil and gas under AS 43.55.160 from the gross value at the point of production of the oil and gas produced from the leases or properties during the month for which the installment payment is calculated;

(B) for oil and gas produced from leases or properties subject to AS 43.55.011(f), the greatest of

(i) zero;

(ii) zero percent, one percent, two percent, three percent, or four percent, as applicable, of the gross value at the point of production of the oil and gas produced from the leases or properties during the month for which the installment payment is calculated; or

(iii) 35 percent multiplied by the remainder obtained by subtracting 1/12 of the producer's adjusted lease expenditures for the calendar year of production under AS 43.55.165 and 43.55.170 that are deductible for the oil and gas under AS 43.55.160 from the gross value at the point of production of the oil and gas produced from those leases or properties during the month for which the installment payment is calculated, except that, for the purposes of this calculation, a reduction from the gross value at the point of production may apply for oil and gas subject to AS 43.55.160(f) or (g);

(C) for oil or gas subject to AS 43.55.011(j), (k), or (o), for each lease or property, the greater of

(i) zero; or

(ii) 35 percent multiplied by the remainder obtained by subtracting 1/12 of the producer's adjusted lease expenditures for the calendar year of production under AS 43.55.165 and 43.55.170 that are deductible under AS 43.55.160 for the oil or gas, respectively, produced from the lease or property from the gross value at the point of production of the oil or gas, respectively, produced from the lease or property during the month for which the installment payment is calculated;

(D) for oil and gas subject to AS 43.55.011(p), the lesser of

(i) 35 percent multiplied by the remainder obtained by subtracting 1/12 of the producer's adjusted lease expenditures for the calendar year of production under AS 43.55.165 and 43.55.170 that are deductible for the oil and gas under AS 43.55.160 from the gross value at the point of production of the oil and gas produced from the leases or properties during the month for which the installment payment is calculated, but not less than zero; or

(ii) four percent of the gross value at the point of production of the oil and gas produced from the leases or properties during the month, but not less than zero;

(6) an amount calculated under (5)(C) of this subsection for oil or gas subject to AS 43.55.011(j), (k), or (o) may not exceed the product obtained by carrying out the calculation set out in AS 43.55.011(j)(1) or (2) or 43.55.011(o), as applicable, for gas or set out in AS 43.55.011(k) for oil, but substituting in AS 43.55.011(j)(1)(A) or (2)(A) or 43.55.011(o), as applicable, the amount of taxable gas produced during the month for the amount of taxable gas produced during the calendar year and substituting in AS 43.55.011(k) the amount of taxable oil produced during the month for the amount of taxable oil produced during the calendar year;

(7) for oil and gas produced on and after January 1, 2021, and

before January 1, 2022, an installment payment of the estimated tax levied by AS 43.55.011, net of any tax credits applied as allowed by law, is due for each month of the calendar year on the last day of the following month; except as otherwise provided under (8) of this subsection, the amount of the installment payment is the sum of the following amounts, less 1/12 of the tax credits that are allowed by law to be applied against the tax levied by AS 43.55.011 for the calendar year, but the amount of the installment payment may not be less than zero:

(A) for oil and gas subject to AS 43.55.011(e) and not subject to AS 43.55.011(o) or (p) produced from leases or properties in the state outside the Cook Inlet sedimentary basin and outside a major oil field, other than leases or properties subject to AS 43.55.011(f) or (s), the greater of

(i) zero; or

(ii) 35 percent multiplied by the remainder obtained by subtracting 1/12 of the producer's adjusted lease expenditures for the calendar year of production under AS 43.55.165 and 43.55.170 that are deductible for the oil and gas under AS 43.55.160 from the gross value at the point of production of the oil and gas produced from the leases or properties during the month for which the installment payment is calculated;

(B) for oil and gas produced from leases or properties subject to AS 43.55.011(f), the greatest of

(i) zero;

(ii) the applicable percentage under AS 43.55.011(f) of the gross value at the point of production of the oil and gas produced from the leases or properties during the month for which the installment payment is calculated; or

(iii) 35 percent multiplied by the remainder obtained by subtracting 1/12 of the producer's adjusted lease expenditures for the calendar year of production under AS 43.55.165 and

43.55.170 that are deductible for the oil and gas under AS 43.55.160 from the gross value at the point of production of the oil and gas produced from those leases or properties during the month for which the installment payment is calculated, except that, for the purposes of this calculation, a reduction from the gross value at the point of production may apply for oil and gas subject to AS 43.55.160(f) or (g);

(C) for oil or gas subject to AS 43.55.011(j), (k), or (o), for each lease or property, the greater of

(i) zero; or

(ii) 35 percent multiplied by the remainder obtained by subtracting 1/12 of the producer's adjusted lease expenditures for the calendar year of production under AS 43.55.165 and 43.55.170 that are deductible under AS 43.55.160 for the oil or gas, respectively, produced from the lease or property from the gross value at the point of production of the oil or gas, respectively, produced from the lease or property during the month for which the installment payment is calculated;

(D) for oil and gas subject to AS 43.55.011(p), the lesser of

(i) 35 percent multiplied by the remainder obtained by subtracting 1/12 of the producer's adjusted lease expenditures for the calendar year of production under AS 43.55.165 and 43.55.170 that are deductible for the oil and gas under AS 43.55.160 from the gross value at the point of production of the oil and gas produced from the leases or properties during the month for which the installment payment is calculated, but not less than zero; or

(ii) four percent of the gross value at the point of production of the oil and gas produced from the leases or properties during the month, but not less than zero;

(E) for oil produced from each major oil field subject to

AS 43.55.011(q), the greatest of

(i) zero;

(ii) the applicable percentage under AS 43.55.011(s) of the gross value at the point of production of the oil produced from the major oil field during the month for which the installment payment is calculated; a tax credit may not be applied against the tax levied by AS 43.55.011(s);

(iii) if the average monthly production tax value of a barrel of oil produced from the major oil field is $50 or less, 35 percent of the average monthly production tax value of a barrel of oil produced from the major oil field; for purposes of this sub-subparagraph, the average monthly production tax value of a barrel of oil produced from the major oil field is calculated under AS 43.55.160(j); or

(iv) if the average monthly production tax value of a barrel of oil produced from the major oil field is more than $50, the sum of 35 percent of the average monthly production tax value of a barrel of oil produced from the major oil field plus the difference between the average monthly production tax value of a barrel of oil produced from the major oil field and $50, multiplied by 15 percent; for the purposes of this sub-subparagraph, the average monthly production tax value of a barrel of oil produced from the major oil field is calculated under AS 43.55.160(j);

(8) an amount calculated under (7)(C) of this subsection for oil or gas subject to AS 43.55.011(j), (k), or (o) may not exceed the product obtained by carrying out the calculation set out in AS 43.55.011(j)(1) or (2) or 43.55.011(o), as applicable, for gas or set out in AS 43.55.011(k) for oil, but substituting in AS 43.55.011(j)(1)(A) or (2)(A) or 43.55.011(o), as applicable, the amount of taxable gas produced during the month for the amount of taxable gas produced during the calendar year and substituting in AS 43.55.011(k) the amount of taxable oil produced during the month for the amount of taxable oil produced

during the calendar year;

(9) [(7)] for oil and gas produced on or after January 1, 2022, an installment payment of the estimated tax levied by **AS 43.55.011** [AS 43.55.011(e)], net of any tax credits applied as allowed by law, is due for each month of the calendar year on the last day of the following month; except as otherwise provided under **(12)** [(10)] of this subsection, the amount of the installment payment is the sum of the following amounts, less 1/12 of the tax credits that are allowed by law to be applied against the tax levied by **AS 43.55.011** [AS 43.55.011(e)] for the calendar year, but the amount of the installment payment may not be less than zero:

(A) for oil produced from leases or properties subject to AS 43.55.011(f), the greatest of

(i) zero;

(ii) **the applicable percentage under AS 43.55.011(f)** [ZERO PERCENT, ONE PERCENT, TWO PERCENT, THREE PERCENT, OR FOUR PERCENT, AS APPLICABLE,] of the gross value at the point of production of the oil produced from the leases or properties during the month for which the installment payment is calculated; or

(iii) 35 percent multiplied by the remainder obtained by subtracting 1/12 of the producer's adjusted lease expenditures for the calendar year of production under AS 43.55.165 and 43.55.170 that are deductible for the oil under AS 43.55.160(h)(1) from the gross value at the point of production of the oil produced from those leases or properties during the month for which the installment payment is calculated, except that, for the purposes of this calculation, a reduction from the gross value at the point of production may apply for oil subject to AS 43.55.160(f) or 43.55.160(f) and (g);

(B) for oil produced before or during the last calendar year under AS 43.55.024(b) for which the producer could take a tax credit under AS 43.55.024(a), from leases or properties in the state outside the Cook Inlet sedimentary basin, no part of which is north of 68 degrees North latitude, other

than leases or properties subject to AS 43.55.011(o) or (p), the greater of

(i) zero; or

(ii) 35 percent multiplied by the remainder obtained by subtracting 1/12 of the producer's adjusted lease expenditures for the calendar year of production under AS 43.55.165 and 43.55.170 that are deductible for the oil under AS 43.55.160(h)(2) from the gross value at the point of production of the oil produced from the leases or properties during the month for which the installment payment is calculated;

(C) for oil and gas produced from leases or properties subject to AS 43.55.011(p), except as otherwise provided under **(10)** [(8)] of this subsection, the sum of

(i) 35 percent multiplied by the remainder obtained by subtracting 1/12 of the producer's adjusted lease expenditures for the calendar year of production under AS 43.55.165 and 43.55.170 that are deductible for the oil under AS 43.55.160(h)(3) from the gross value at the point of production of the oil produced from the leases or properties during the month for which the installment payment is calculated, but not less than zero; and

(ii) 13 percent of the gross value at the point of production of the gas produced from the leases or properties during the month, but not less than zero;

(D) for oil produced from leases or properties in the state, no part of which is north of 68 degrees North latitude, other than leases or properties subject to (B), (C), or (F) of this paragraph, the greater of

(i) zero; or

(ii) 35 percent multiplied by the remainder obtained by subtracting 1/12 of the producer's adjusted lease expenditures for the calendar year of production under AS 43.55.165 and 43.55.170 that are deductible for the oil under AS 43.55.160(h)(4) from the gross value at the point of production of the oil produced from the leases or properties during the month for which the installment payment is calculated;

(E) for gas produced from each lease or property in the state outside the Cook Inlet sedimentary basin, other than a lease or property subject to AS 43.55.011(o) or (p), 13 percent of the gross value at the point of production of the gas produced from the lease or property during the month for which the installment payment is calculated, but not less than zero;

(F) for oil subject to AS 43.55.011(k), for each lease or property, the greater of

(i) zero; or

(ii) 35 percent multiplied by the remainder obtained by subtracting 1/12 of the producer's adjusted lease expenditures for the calendar year of production under AS 43.55.165 and 43.55.170 that are deductible under AS 43.55.160 for the oil produced from the lease or property from the gross value at the point of production of the oil produced from the lease or property during the month for which the installment payment is calculated;

(G) for gas subject to AS 43.55.011(j) or (o), for each lease or property, the greater of

(i) zero; or

(ii) 13 percent of the gross value at the point of production of the gas produced from the lease or property during the month for which the installment payment is calculated;

(H) for oil produced from each major oil field subject to AS 43.55.011(q), the greatest of

(i) zero;

(ii) the applicable percentage under AS 43.55.011(s) of the gross value at the point of production of the oil produced from the major oil field during the month for which the installment payment is calculated; a tax credit may not be applied against the tax levied by AS 43.55.011(s);

(iii) if the average monthly production tax value of a barrel of oil produced from the major oil field is $50 or less, 35

percent of the average monthly production tax value of a barrel of oil produced from the major oil field; for the purposes of this sub-subparagraph, the average monthly production tax value of a barrel of oil produced from the major oil field is calculated under AS 43.55.160(j); or

(iv) if the average monthly production tax value of a barrel of oil produced from the major oil field is more than $50, the sum of 35 percent of the average monthly production tax value of a barrel of oil produced from the major oil field plus the difference between the average monthly production tax value of a barrel of oil produced from the major oil field and $50, multiplied by 15 percent; for the purposes of this sub-subparagraph, the average monthly production tax value of a barrel of oil produced from the major oil field is calculated under AS 43.55.160(j);

(10) [(8)] an amount calculated under **(9)(C)** [(7)(C)] of this subsection may not exceed four percent of the gross value at the point of production of the oil and gas produced from leases or properties subject to AS 43.55.011(p) during the month for which the installment payment is calculated;

(11) [(9)] for purposes of the calculation under (1)(B)(ii), (5)(B)(ii), **(7)(B)(ii),** and **(9)(A)(ii)** [(7)(A)(ii)] of this subsection, the applicable percentage of the gross value at the point of production is determined under AS 43.55.011(f)(1) or (2) but substituting the phrase "month for which the installment payment is calculated" in AS 43.55.011(f)(1) and (2) for the phrase "calendar year for which the tax is due";

(12) [(10)] an amount calculated under **(9)(F)** [(7)(F)] or (G) of this subsection for oil or gas subject to AS 43.55.011(j), (k), or (o) may not exceed the product obtained by carrying out the calculation set out in AS 43.55.011(j)(1) or (2) or 43.55.011(o), as applicable, for gas, or set out in AS 43.55.011(k) for oil, but substituting in AS 43.55.011(j)(1)(A) or (2)(A) or 43.55.011(o), as applicable, the amount of taxable gas produced during the month for the amount of taxable gas produced during the calendar year and substituting in AS 43.55.011(k) the amount of taxable oil produced during the month for the amount of taxable oil produced during

the calendar year.

*** Sec. 9.** AS 43.55.020(g) is amended to read:

(g) Notwithstanding any contrary provision of AS 43.05.225,

(1) before January 1, 2014, an unpaid amount of an installment payment required under (a)(1) - (3) of this section that is not paid when due bears interest (A) at the rate provided for an underpayment under 26 U.S.C. 6621 (Internal Revenue Code), as amended, compounded daily, from the date the installment payment is due until March 31 following the calendar year of production, and (B) as provided for a delinquent tax under AS 43.05.225 after that March 31; interest accrued under (A) of this paragraph that remains unpaid after that March 31 is treated as an addition to tax that bears interest under (B) of this paragraph; an unpaid amount of tax due under (a)(4) of this section that is not paid when due bears interest as provided for a delinquent tax under AS 43.05.225;

(2) on and after January 1, 2014, an unpaid amount of an installment payment required under (a)(3), (5), (6), [OR] (7)**, (8), or (9)** of this section that is not paid when due bears interest (A) at the rate provided for an underpayment under 26 U.S.C. 6621 (Internal Revenue Code), as amended, compounded daily, from the date the installment payment is due until March 31 following the calendar year of production, and (B) as provided for a delinquent tax under AS 43.05.225 after that March 31; interest accrued under (A) of this paragraph that remains unpaid after that March 31 is treated as an addition to tax that bears interest under (B) of this paragraph; an unpaid amount of tax due under (a)(4) of this section that is not paid when due bears interest as provided for a delinquent tax under AS 43.05.225.

*** Sec. 10.** AS 43.55.020(h) is amended to read:

(h) Notwithstanding any contrary provision of AS 43.05.280,

(1) an overpayment of an installment payment required under (a)(1), (2), (3), (5), (6), [OR] (7)**, (8), or (9)** of this section bears interest at the rate provided for an overpayment under 26 U.S.C. 6621 (Internal Revenue Code), as amended, compounded daily, from the later of the date the installment payment is due or the date the overpayment is made, until the earlier of

(A) the date it is refunded or is applied to an underpayment; or

(B) March 31 following the calendar year of production;

(2) except as provided under (1) of this subsection, interest with respect to an overpayment is allowed only on any net overpayment of the payments required under (a) of this section that remains after the later of March 31 following the calendar year of production or the date that the statement required under AS 43.55.030(a) is filed;

(3) interest is allowed under (2) of this subsection only from a date that is 90 days after the later of March 31 following the calendar year of production or the date that the statement required under AS 43.55.030(a) is filed; interest is not allowed if the overpayment was refunded within the 90-day period;

(4) interest under (2) and (3) of this subsection is paid at the rate and in the manner provided in AS 43.05.225(1).

*** Sec. 11.** AS 43.55.020(k) is amended to read:

(k) For oil and gas produced on and after

(1) January 1, 2014, and before January 1, **2021** [2022], in making settlement with the royalty owner for oil and gas that is taxable under AS 43.55.011, the producer may deduct the amount of the tax paid on taxable royalty oil and gas, or may deduct taxable royalty oil or gas equivalent in value at the time the tax becomes due to the amount of the tax paid**; if** [. IF] the total deductions of installment payments of estimated tax for a calendar year exceed the actual tax for that calendar year, the producer shall, before April 1 of the following year, refund the excess to the royalty owner**; unless** [. UNLESS] otherwise agreed between the producer and the royalty owner, the amount of the tax paid under AS 43.55.011(e) on taxable royalty oil and gas for a calendar year, other than oil and gas the ownership or right to which constitutes a landowner's royalty interest, is considered to be the gross value at the point of production of the taxable royalty oil and gas produced during the calendar year multiplied by a figure that is a quotient, in which

(A) [(1)] the numerator is the producer's total tax liability under AS 43.55.011(e)(2) for the calendar year of production; and

(B) [(2)] the denominator is the total gross value at the point of production of the oil and gas taxable under AS 43.55.011(e) produced by the

producer from all leases and properties in the state during the calendar year;

(2) January 1, 2021, and before January 1, 2022, in making settlement with the royalty owner for oil and gas that is taxable under AS 43.55.011, the producer may deduct the amount of the tax paid on taxable royalty oil and gas, or may deduct taxable royalty oil or gas equivalent in value at the time the tax becomes due to the amount of the tax paid; if the total deductions of installment payments of estimated tax for a calendar year exceed the actual tax for that calendar year, the producer shall, before April 1 of the following year, refund the excess to the royalty owner; unless otherwise agreed between the producer and the royalty owner, the amount of the tax paid under AS 43.55.011 on taxable royalty oil and gas for a calendar year, other than oil and gas the ownership or right to which constitutes a landowner's royalty interest, is considered to be the gross value at the point of production of the taxable royalty oil and gas produced during the calendar year multiplied by a figure that is a quotient, in which

(A) the numerator is the producer's total tax liability under AS 43.55.011(e)(2) and (q) for the calendar year of production; and

(B) the denominator is the total gross value at the point of production of the oil and gas taxable under AS 43.55.011(e) and (q) produced by the producer from all leases and properties in the state during the calendar year.

*** Sec. 12.** AS 43.55.020(*l*) is amended to read:

(*l*) For oil and gas produced on and after January 1, 2022, in making settlement with the royalty owner for oil and gas that is taxable under AS 43.55.011, the producer may deduct the amount of the tax paid on taxable royalty oil and gas, or may deduct taxable royalty oil or gas equivalent in value at the time the tax becomes due to the amount of the tax paid. If the total deductions of installment payments of estimated tax for a calendar year exceed the actual tax for that calendar year, the producer shall, before April 1 of the following year, refund the excess to the royalty owner. In making settlement with the royalty owner for gas that is taxable under AS 43.55.014, the producer may deduct the amount of the gas paid as in-kind tax on

taxable royalty gas or may deduct the gross value at the point of production of the gas paid as in-kind tax on taxable royalty gas. Unless otherwise agreed between the producer and the royalty owner, the amount of the tax paid under **AS 43.55.011** [AS 43.55.011(e)] on taxable royalty oil for a calendar year, other than oil the ownership or right to which constitutes a landowner's royalty interest, is considered to be the gross value at the point of production of the taxable royalty oil produced during the calendar year multiplied by a figure that is a quotient, in which

(1) the numerator is the producer's total tax liability under AS 43.55.011(e)(3)(A) **and (q)** for the calendar year of production; and

(2) the denominator is the total gross value at the point of production of the oil taxable under AS 43.55.011(e) **and (q)** produced by the producer from all leases and properties in the state during the calendar year.

*** Sec. 13.** AS 43.55.023(a) is amended to read:

(a) A producer or explorer may take a tax credit for a qualified capital expenditure as follows:

(1) notwithstanding that a qualified capital expenditure may be a deductible lease expenditure for purposes of calculating the production tax value of oil and gas under AS 43.55.160(a), unless a credit for that expenditure is taken under former AS 43.20.043 or AS 43.55.025, a producer or explorer that incurs a qualified capital expenditure may also elect to apply a tax credit against a tax levied by **AS 43.55.011** [AS 43.55.011(e)] in the amount of 10 percent of that expenditure;

(2) a producer or explorer may take a credit for a qualified capital expenditure incurred in connection with geological or geophysical exploration or in connection with an exploration well only if the producer or explorer

(A) agrees, in writing, to the applicable provisions of AS 43.55.025(f)(2); and

(B) submits to the Department of Natural Resources all data that would be required to be submitted under AS 43.55.025(f)(2);

(3) a credit for a qualified capital expenditure incurred to explore for, develop, or produce oil or gas deposits located

(A) north of 68 degrees North latitude may be taken only if the

expenditure is incurred before January 1, 2014;

(B) in the Cook Inlet sedimentary basin may be taken only if the expenditure is incurred before January 1, 2018.

*** Sec. 14.** AS 43.55.023(c) is amended to read:

(c) A credit or portion of a credit under this section

(1) may not be

(A) used to reduce a person's tax liability under **AS 43.55.011** [AS 43.55.011(e)] for any calendar year below zero; **or**

(B) applied against the tax imposed under AS 43.55.011(s);

(2) may, if not used under this subsection, be applied in a later calendar year;

(3) may, regardless of when the credit was earned, be used to satisfy a tax, interest, penalty, fee, or other charge that

(A) is related to the tax due under this chapter for a prior year, except for a surcharge under AS 43.55.201 - 43.55.299 or 43.55.300 or the tax levied by AS 43.55.011(i) or 43.55.014; and

(B) has not, for the purpose of art. IX, sec. 17(a), Constitution of the State of Alaska, been subject to an administrative proceeding or litigation.

*** Sec. 15.** AS 43.55.024(c) is amended to read:

(c) For a calendar year for which a producer's tax liability under **AS 43.55.011** [AS 43.55.011(e)] exceeds zero before application of any credits under this chapter, other than a credit under (a) of this section but after application of any credit under (a) of this section, a producer that is qualified under (e) of this section and whose average amount of oil and gas produced a day and taxable under **AS 43.55.011** [AS 43.55.011(e)] is less than 100,000 BTU equivalent barrels a day may apply a tax credit under this subsection against that liability. A producer whose average amount of oil and gas produced a day and taxable under **AS 43.55.011** [AS 43.55.011(e)] is

(1) not more than 50,000 BTU equivalent barrels may apply a tax credit of not more than $12,000,000 for the calendar year;

(2) more than 50,000 and less than 100,000 BTU equivalent barrels

may apply a tax credit of not more than $12,000,000 multiplied by the following fraction for the calendar year:

$$1 - [2 \times (AP - 50{,}000)] \div 100{,}000$$

where AP = the average amount of oil and gas taxable under **AS 43.55.011** [AS 43.55.011(e)], produced a day during the calendar year in BTU equivalent barrels.

*** Sec. 16.** AS 43.55.024(e) is amended to read:

(e) On written application by a producer that includes any information the department may require, the department shall determine whether the producer qualifies for a calendar year under (a) and (c) of this section. To qualify under (a) and (c) of this section, a producer must demonstrate that its operation in the state or its ownership of an interest in a lease or property in the state as a distinct producer would not result in the division among multiple producer entities of any production tax liability under **AS 43.55.011** [AS 43.55.011(e)] that reasonably would be expected to be attributed to a single producer if the tax credit provisions of (a) or (c) of this section did not exist.

*** Sec. 17.** AS 43.55.024(g) is amended to read:

(g) A tax credit authorized by (c) of this section may not be applied

(1) to reduce a producer's tax liability for any calendar year under **AS 43.55.011** [AS 43.55.011(e)] below zero**; or**

(2) against the tax imposed under AS 43.55.011(s).

*** Sec. 18.** AS 43.55.024(i) is amended to read:

(i) A producer may apply against the producer's tax liability for the calendar year under AS 43.55.011(e) a tax credit of $5 for each barrel of oil taxable under AS 43.55.011(e) that receives a reduction in the gross value at the point of production under AS 43.55.160(f) or (g) and that is produced during a calendar year after December 31, 2013. A tax credit authorized by this subsection

(1) may not reduce a producer's tax liability for a calendar year under AS 43.55.011(e) below zero**; and**

(2) does not apply to oil produced from a major oil field.

*** Sec. 19.** AS 43.55.024(j) is amended to read:

(j) A producer may apply against the producer's tax liability for the calendar

year under AS 43.55.011(e) a tax credit in the amount specified in this subsection for each barrel of oil taxable under AS 43.55.011(e) that does not receive a reduction in the gross value at the point of production under AS 43.55.160(f) or (g) and that is produced during a calendar year after December 31, 2013, from leases or properties north of 68 degrees North latitude. A tax credit under this subsection may not reduce a producer's tax liability for a calendar year under AS 43.55.011(e) below the amount calculated under AS 43.55.011(f) **and does not apply to oil produced from a major oil field**. The amount of the tax credit for a barrel of taxable oil subject to this subsection produced during a month of the calendar year is

(1) $8 for each barrel of taxable oil if the average gross value at the point of production for the month is less than $80 a barrel;

(2) $7 for each barrel of taxable oil if the average gross value at the point of production for the month is greater than or equal to $80 a barrel, but less than $90 a barrel;

(3) $6 for each barrel of taxable oil if the average gross value at the point of production for the month is greater than or equal to $90 a barrel, but less than $100 a barrel;

(4) $5 for each barrel of taxable oil if the average gross value at the point of production for the month is greater than or equal to $100 a barrel, but less than $110 a barrel;

(5) $4 for each barrel of taxable oil if the average gross value at the point of production for the month is greater than or equal to $110 a barrel, but less than $120 a barrel;

(6) $3 for each barrel of taxable oil if the average gross value at the point of production for the month is greater than or equal to $120 a barrel, but less than $130 a barrel;

(7) $2 for each barrel of taxable oil if the average gross value at the point of production for the month is greater than or equal to $130 a barrel, but less than $140 a barrel;

(8) $1 for each barrel of taxable oil if the average gross value at the point of production for the month is greater than or equal to $140 a barrel, but less

than $150 a barrel;

(9) zero if the average gross value at the point of production for the month is greater than or equal to $150 a barrel.

*** Sec. 20.** AS 43.55.025(a) is amended to read:

(a) Subject to the terms and conditions of this section, a credit against the tax levied by **AS 43.55.011** [AS 43.55.011(e)] or, if the credit is for exploration expenditures incurred for work performed on or after July 1, 2016, against the tax levied by AS 43.20 is allowed for exploration expenditures that qualify under (b) of this section in an amount equal to one of the following:

(1) 30 percent of the total exploration expenditures that qualify only under (b) and (c) of this section;

(2) 30 percent of the total exploration expenditures that qualify only under (b) and (d) of this section;

(3) 40 percent of the total exploration expenditures that qualify under (b), (c), and (d) of this section;

(4) 40 percent of the total exploration expenditures that qualify only under (b) and (e) of this section;

(5) 80, 90, or 100 percent, or a lesser amount described in (*l*) of this section, of the total exploration expenditures described in (b)(2) and (3) of this section and not excluded by (b)(4) and (5) of this section that qualify only under (*l*) of this section;

(6) the lesser of $25,000,000 or 80 percent of the total exploration drilling expenditures described in (m) of this section and that qualify under (b) and (c)(1), (c)(2)(A), and (c)(2)(C) of this section; or

(7) the lesser of $7,500,000 or 75 percent of the total seismic exploration expenditures described in (n) of this section and that qualify under (b) of this section.

*** Sec. 21.** AS 43.55.025(f) is amended to read:

(f) For a production tax credit under this section,

(1) an explorer shall, in a form prescribed by the department and, except for a credit under (k) of this section, within six months of the completion of the

exploration activity, claim the credit and submit information sufficient to demonstrate to the department's satisfaction that the claimed exploration expenditures qualify under this section; in addition, the explorer shall submit information necessary for the commissioner of natural resources to evaluate the validity of the explorer's compliance with the requirements of this section;

(2) an explorer shall agree, in writing,

(A) to notify the Department of Natural Resources, within 30 days after completion of seismic or geophysical data processing, completion of well drilling, or filing of a claim for credit, whichever is the latest, for which exploration costs are claimed, of the date of completion and submit a report to that department describing the processing sequence and providing a list of data sets available;

(B) to provide to the Department of Natural Resources, within 30 days after the date of a request, unless a longer period is provided by the Department of Natural Resources, specific data sets, ancillary data, and reports identified in (A) of this paragraph; in this subparagraph,

(i) a seismic or geophysical data set includes the data for an entire seismic survey, irrespective of whether the survey area covers nonstate land in addition to state land or land in a unit in addition to land outside a unit;

(ii) well data include all analyses conducted on physical material, and well logs collected from the well, results, and copies of data collected and data analyses for the well, including well logs; sample analyses; testing geophysical and velocity data including seismic profiles and check shot surveys; testing data and analyses; age data; geochemical analyses; and tangible material;

(C) that, notwithstanding any provision of AS 38, information provided under this paragraph will be held confidential by the Department of Natural Resources,

(i) in the case of well data, until the expiration of the 24-month period of confidentiality described in AS 31.05.035(c), at

which time the Department of Natural Resources will release the information after 30 days' public notice unless, in the discretion of the commissioner of natural resources, it is necessary to protect information relating to the valuation of unleased acreage in the same vicinity, or unless the well is on private land and the owner, including the lessor but not the lessee, of the oil and gas resources has not given permission to release the well data;

(ii) in the case of seismic or other geophysical data, other than seismic data acquired by seismic exploration subject to (k) of this section, for 10 years following the completion date, at which time the Department of Natural Resources will release the information after 30 days' public notice, except as to seismic or other geophysical data acquired from private land, unless the owner, including a lessor but not a lessee, of the oil and gas resources in the private land gives permission to release the seismic or other geophysical data associated with the private land;

(iii) in the case of seismic data obtained by seismic exploration subject to (k) of this section, only until the expiration of 30 days' public notice issued on or after the date the production tax credit certificate is issued under (5) of this subsection;

(3) if more than one explorer holds an interest in a well or seismic exploration, each explorer may claim an amount of credit that is proportional to the explorer's cost incurred;

(4) the department may exercise the full extent of its powers as though the explorer were a taxpayer under this title, in order to verify that the claimed expenditures are qualified exploration expenditures under this section; and

(5) if the department is satisfied that the explorer's claimed expenditures are qualified under this section and that all data required to be submitted under this section have been submitted, the department shall issue to the explorer a production tax credit certificate for the amount of credit to be allowed against production taxes levied by **AS 43.55.011** [AS 43.55.011(e)] and, if the credit is for

exploration expenditures incurred for work performed on or after July 1, 2016, against taxes levied by AS 43.20; notwithstanding any contrary provision of AS 38, AS 40.25.100, or AS 43.05.230, the following information is not confidential:

(A) the explorer's name;

(B) the date of the application;

(C) the location of the well or seismic exploration;

(D) the date of the department's issuance of the certificate; and

(E) the date on which the information required to be submitted under this section will be released.

*** Sec. 22.** AS 43.55.025(h) is amended to read:

(h) A producer that purchases a production tax credit certificate may apply the credits against its production tax levied by **AS 43.55.011** [AS 43.55.011(e)]. Regardless of the price the producer paid for the certificate, the producer may receive a credit against its production tax liability for the full amount of the credit, but for not more than the amount for which the certificate is issued. A production tax credit or a portion of a production tax credit or a production tax credit certificate or a portion of a production tax credit certificate allowed under this section

(1) may not be applied

(A) more than once;

(B) against the tax imposed under AS 43.55.011(s);

(2) may be applied in a later calendar year;

(3) may, regardless of when the credit was earned, be applied to satisfy a tax, interest, penalty, fee, or other charge that

(A) is related to the tax due under this chapter for a prior year, except for a surcharge under AS 43.55.201 - 43.55.299 or 43.55.300 or the tax levied by AS 43.55.011(i) or 43.55.014; and

(B) has not, for the purpose of art. IX, sec. 17(a), Constitution of the State of Alaska, been subject to an administrative proceeding or litigation.

*** Sec. 23.** AS 43.55.025(i) is amended to read:

(i) For a production tax credit under this section,

(1) a credit may not be applied to reduce a taxpayer's tax liability under **AS 43.55.011** [AS 43.55.011(e)] below zero for a calendar year;

(2) if the production tax credit is for exploration expenditures incurred for work performed on or after July 1, 2016, the explorer may apply the credit to reduce the explorer's tax liability under AS 43.20, except that the credit may not be applied to reduce the explorer's tax liability under AS 43.20 below zero for a tax year; and

(3) an amount of the production tax credit in excess of the amount that may be applied for a calendar or tax year under this subsection may be carried forward and applied against the taxpayer's tax liability under **AS 43.55.011** [AS 43.55.011(e)] in one or more later calendar years or under AS 43.20 in one or more later tax years.

*** Sec. 24.** AS 43.55.028(e) is amended to read:

(e) The department, on the written application of a person to whom a transferable tax credit certificate has been issued under AS 43.55.023(d) or former AS 43.55.023(m) for an expenditure incurred before July 1, 2017, or to whom a production tax credit certificate has been issued under AS 43.55.025(f) for an expenditure incurred before July 1, 2017, may use either available money in the oil and gas tax credit fund or, subject to appropriation by the legislature, money disbursed to the commissioner, or both, to purchase, in whole or in part, the certificate. The department may not purchase with money from the oil and gas tax credit fund a total of more than $70,000,000 in tax credit certificates from a person in a calendar year. The total amount of purchases made by the department with money from the oil and gas tax credit fund from a person in a year may not exceed the assumed payment amount for each year, as calculated under (*l*) of this section without the discount provided in (m) of this section. Before purchasing a certificate or part of a certificate, the department shall find that

(1) the calendar year of the purchase is not earlier than the first calendar year for which the credit shown on the certificate would otherwise be allowed to be applied against a tax;

(2) the application is not the result of the division of a single entity into multiple entities that would reasonably be expected to apply as a single entity if the

$70,000,000 limitation in this subsection did not exist;

(3) the applicant's total tax liability under **AS 43.55.011** [AS 43.55.011(e)], after application of all available tax credits, for the calendar year in which the application is made is zero;

(4) the applicant's average daily production of oil and gas taxable under **AS 43.55.011** [AS 43.55.011(e)] during the calendar year preceding the calendar year in which the application is made was not more than 50,000 BTU equivalent barrels; and

(5) the purchase is consistent with this section and regulations adopted under this section.

*** Sec. 25.** AS 43.55.030(a) is amended to read:

(a) A producer that produces oil or gas from a lease or property in the state during a calendar year, whether or not any tax payment is due under AS 43.55.020(a) for that oil or gas, shall file with the department on March 31 of the following year a statement, under oath, in a form prescribed by the department, giving, with other information required, the following:

(1) a description of each lease or property **and each major oil field** from which oil or gas was produced, by name, legal description, lease number, or accounting codes assigned by the department;

(2) the names of the producer and, if different, the person paying the tax, if any;

(3) the gross amount of oil and the gross amount of gas produced from each lease or property **and each major oil field**, separately identifying the gross amount of gas produced from each oil and gas lease to which an effective election under AS 43.55.014(a) applies, the amount of gas delivered to the state under AS 43.55.014(b), and the percentage of the gross amount of oil and gas owned by the producer;

(4) the gross value at the point of production of the oil and of the gas produced from each lease or property **and each major oil field** owned by the producer and the costs of transportation of the oil and gas;

(5) the name of the first purchaser and the price received for the oil and

for the gas, unless relieved from this requirement in whole or in part by the department;

(6) the producer's qualified capital expenditures, as defined in AS 43.55.023, other lease expenditures under AS 43.55.165, and adjustments or other payments or credits under AS 43.55.170;

(7) the production tax values of the oil and gas, **separately,** under AS 43.55.160(a) **or (i)** or of the oil under AS 43.55.160(h) **or (j)**, as applicable;

(8) any claims for tax credits to be applied; and

(9) calculations showing the amounts, if any, that were or are due under AS 43.55.020(a) and interest on any underpayment or overpayment.

*** Sec. 26.** AS 43.55.075(b) is amended to read:

(b) A decision of a regulatory agency, court, or other body with authority to resolve disputes that results in a retroactive change to a lease expenditure, to an adjustment to a lease expenditure, **to the allocation of a lease expenditure between oil and gas,** to costs of transportation, to sale price, to prevailing value, or to consideration of quality differentials relating to the commingling of oils **that** has a corresponding effect, either an increase or decrease, as applicable, on the production tax value of oil or gas or the amount or availability of a tax credit as determined under this chapter. For purposes of this section, a change to a lease expenditure includes a change in the categorization of a lease expenditure as a qualified capital expenditure or as not a qualified capital expenditure. The producer shall

(1) within 60 days after the change, notify the department in writing; and

(2) within 120 days after the change, file amended returns covering all periods affected by the change, unless the department agrees otherwise or a stay is in place that affects the filing or payment, regardless of the pendency of appeals of the decision.

*** Sec. 27.** AS 43.55.150 is amended by adding new subsections to read:

(d) The department shall adopt regulations consistent with this section for determining the gross value at the point of production of

(1) oil;

(2) gas; and

(3) oil produced from a major oil field.

(e) The department shall adopt regulations consistent with this chapter for determining the monthly gross value at the point of production for oil produced from each major oil field.

* **Sec. 28.** AS 43.55.160(a) is amended to read:

(a) For oil and gas produced before **January 1, 2021** [JANUARY 1, 2022], except as provided in (b), (f), and (g) of this section, for the purposes of

(1) AS 43.55.011(e)(1) and (2), the annual production tax value of taxable oil, gas, or oil and gas produced during a calendar year in a category for which a separate annual production tax value is required to be calculated under this paragraph is the gross value at the point of production of that oil, gas, or oil and gas taxable under AS 43.55.011(e), less the producer's lease expenditures under AS 43.55.165 for the calendar year applicable to the oil, gas, or oil and gas in that category produced by the producer during the calendar year, as adjusted under AS 43.55.170; a separate annual production tax value shall be calculated for

(A) oil and gas produced from leases or properties in the state that include land north of 68 degrees North latitude, other than gas produced before **2021** [2022] and used in the state;

(B) oil and gas produced from leases or properties in the state outside the Cook Inlet sedimentary basin, no part of which is north of 68 degrees North latitude and that qualifies for a tax credit under AS 43.55.024(a) and (b); this subparagraph does not apply to

(i) gas produced before **2021** [2022] and used in the state; or

(ii) oil and gas subject to AS 43.55.011(p);

(C) oil produced before **2021** [2022] from each lease or property in the Cook Inlet sedimentary basin;

(D) gas produced before **2021** [2022] from each lease or property in the Cook Inlet sedimentary basin;

(E) gas produced before **2021** [2022] from each lease or

property in the state outside the Cook Inlet sedimentary basin and used in the state, other than gas subject to AS 43.55.011(p);

(F) oil and gas subject to AS 43.55.011(p) produced from leases or properties in the state;

(G) oil and gas produced from leases or properties in the state no part of which is north of 68 degrees North latitude, other than oil or gas described in (B), (C), (D), (E), or (F) of this paragraph;

(2) AS 43.55.011(g), for oil and gas produced before January 1, 2014, the monthly production tax value of the taxable

(A) oil and gas produced during a month from leases or properties in the state that include land north of 68 degrees North latitude is the gross value at the point of production of the oil and gas taxable under AS 43.55.011(e) and produced by the producer from those leases or properties, less 1/12 of the producer's lease expenditures under AS 43.55.165 for the calendar year applicable to the oil and gas produced by the producer from those leases or properties, as adjusted under AS 43.55.170; this subparagraph does not apply to gas subject to AS 43.55.011(o);

(B) oil and gas produced during a month from leases or properties in the state outside the Cook Inlet sedimentary basin, no part of which is north of 68 degrees North latitude, is the gross value at the point of production of the oil and gas taxable under AS 43.55.011(e) and produced by the producer from those leases or properties, less 1/12 of the producer's lease expenditures under AS 43.55.165 for the calendar year applicable to the oil and gas produced by the producer from those leases or properties, as adjusted under AS 43.55.170; this subparagraph does not apply to gas subject to AS 43.55.011(o);

(C) oil produced during a month from a lease or property in the Cook Inlet sedimentary basin is the gross value at the point of production of the oil taxable under AS 43.55.011(e) and produced by the producer from that lease or property, less 1/12 of the producer's lease expenditures under AS 43.55.165 for the calendar year applicable to the oil produced by the

producer from that lease or property, as adjusted under AS 43.55.170;

(D) gas produced during a month from a lease or property in the Cook Inlet sedimentary basin is the gross value at the point of production of the gas taxable under AS 43.55.011(e) and produced by the producer from that lease or property, less 1/12 of the producer's lease expenditures under AS 43.55.165 for the calendar year applicable to the gas produced by the producer from that lease or property, as adjusted under AS 43.55.170;

(E) gas produced during a month from a lease or property outside the Cook Inlet sedimentary basin and used in the state is the gross value at the point of production of that gas taxable under AS 43.55.011(e) and produced by the producer from that lease or property, less 1/12 of the producer's lease expenditures under AS 43.55.165 for the calendar year applicable to that gas produced by the producer from that lease or property, as adjusted under AS 43.55.170.

*** Sec. 29.** AS 43.55.160(c) is amended to read:

(c) Notwithstanding any contrary provision of AS 43.55.150, for purposes of calculating a monthly production tax value under (a)(2) **or (j)** of this section, the gross value at the point of production of the **oil, gas, or** oil and gas**, as applicable,** is calculated under regulations adopted by the department that provide for using an appropriate monthly share of the producer's costs of transportation for the calendar year.

*** Sec. 30.** AS 43.55.160(d) is amended to read:

(d) Irrespective of whether a producer produces taxable oil or gas during a calendar year or month, the producer is considered to have generated a positive production tax value if a calculation described in (a)**, (h), (i), or (j)** of this section yields a positive number because the producer's adjusted lease expenditures for a calendar year under AS 43.55.165 and 43.55.170 are less than zero as a result of the producer's receiving a payment or credit under AS 43.55.170. An explorer that has obtained a transferable tax credit certificate under AS 43.55.023(d) for the amount of a tax credit under former AS 43.55.023(b) is considered a producer, subject to the tax levied by AS 43.55.011(e), to the extent that the explorer generates a positive

production tax value as the result of the explorer's receiving a payment or credit under AS 43.55.170.

*** Sec. 31.** AS 43.55.160(e) is amended to read:

(e) Any adjusted lease expenditures under AS 43.55.165 and 43.55.170 incurred to explore for, develop, or produce oil or gas from a lease, [OR] property, **or major oil field** outside the Cook Inlet sedimentary basin that would otherwise be deductible by a producer in a calendar year but whose deduction would cause an annual production tax value calculated under (a)(1), [OR] (h), **or (i)** of this section of taxable oil or gas produced during the calendar year to be less than zero may be used to establish a **carried-forward** [CARRIED- FORWARD] annual loss under AS 43.55.165(a)(3). A reduction under (f) or (g) of this section must be added back to the calculation of production tax values for that calendar year before the determination of a carried-forward annual loss under this subsection. However, the department shall provide by regulation a method to ensure that, for a period for which a producer's tax liability is limited by AS 43.55.011(o) or (p), any adjusted lease expenditures under AS 43.55.165 and 43.55.170 that would otherwise be deductible by a producer for that period but whose deduction would cause a production tax value calculated under (a)(1)(E) or (F), [OR] (h)(3), **or (i)(5) or (6)** of this section to be less than zero are accounted for as though the adjusted lease expenditures had first been used as deductions in calculating the production tax values of oil or gas subject to any of the limitations under AS 43.55.011(o) or (p) that have positive production tax values so as to reduce the tax liability calculated without regard to the limitation to the maximum amount provided for under the applicable provision of AS 43.55.011(o) or (p). Only the amount of those adjusted lease expenditures remaining after the accounting provided for under this subsection may be used to establish a carried-forward annual loss under AS 43.55.165(a)(3). In this subsection, "producer" includes "explorer."

*** Sec. 32.** AS 43.55.160(f) is amended to read:

(f) On and after January 1, 2014, in the calculation of an annual production tax value of a producer under (a)(1)(A), [OR] (h)(1), **(i)(1) or (8), or (j)** of this section, the gross value at the point of production of oil or gas produced from a lease, [OR] property, **or major oil field** north of 68 degrees North latitude meeting one or more of

the following criteria is reduced by 20 percent: (1) the oil or gas is produced from a lease, [OR] property, **or major oil field** that does not contain a lease that was within a unit on January 1, 2003; (2) the oil or gas is produced from a participating area established after December 31, 2011, that is within a unit formed under AS 38.05.180(p) before January 1, 2003, if the participating area does not contain a reservoir that had previously been in a participating area established before December 31, 2011; (3) the oil or gas is produced from acreage that was added to an existing participating area by the Department of Natural Resources on and after January 1, 2014, and the producer demonstrates to the department that the volume of oil or gas produced is from acreage added to an existing participating area. This subsection does not apply to gas produced before 2022 that is used in the state or to gas produced on and after January 1, 2022. For oil and gas first produced from a lease or property after December 31, 2016, a reduction allowed under this subsection applies from the date of commencement of regular production of oil and gas from that lease or property and expires after three years, consecutive or nonconsecutive, in which the average annual price per barrel for Alaska North Slope crude oil for sale on the United States West Coast is more than $70 or after seven years, whichever occurs first. For oil and gas first produced from a lease or property before January 1, 2017, a reduction allowed under this subsection expires on the earlier of January 1, 2023, or January 1 following three years, consecutive or nonconsecutive, in which the average annual price per barrel for Alaska North Slope crude oil for sale on the United States West Coast is more than $70. The Alaska Oil and Gas Conservation Commission shall determine the commencement of regular production of oil and gas for purposes of this subsection. A reduction under this subsection may not reduce the gross value at the point of production below zero. In this subsection, "participating area" means a reservoir or portion of a reservoir producing or contributing to production as approved by the Department of Natural Resources.

*** Sec. 33.** AS 43.55.160(g) is amended to read:

(g) On and after January 1, 2014, in addition to the reduction under (f) of this section, in the calculation of an annual production tax value of a producer under (a)(1)(A), [OR] (h)(1), **(i)(1) or (8), or (j)** of this section, the gross value at the point

of production of oil or gas produced from a lease, [OR] property, **or major oil field** north of 68 degrees North latitude that does not contain a lease that was within a unit on January 1, 2003, is reduced by 10 percent if the oil or gas is produced from a unit made up solely of leases that have a royalty share of more than 12.5 percent in amount or value of the production removed or sold from the lease as determined under AS 38.05.180(f). This subsection does not apply if the royalty obligation for one or more of the leases in the unit has been reduced to 12.5 percent or less under AS 38.05.180(j) for all or part of the calendar year for which the annual production tax value is calculated. This subsection does not apply to gas produced before 2022 that is used in the state or to gas produced on and after January 1, 2022. For oil and gas first produced from a lease or property after December 31, 2016, a reduction allowed under this subsection applies from the date of commencement of regular production of oil and gas from that lease or property and expires after three years, consecutive or nonconsecutive, in which the average annual price per barrel for Alaska North Slope crude oil for sale on the United States West Coast is more than $70 or after seven years, whichever occurs first. For oil and gas first produced from a lease or property before January 1, 2017, a reduction allowed under this subsection expires on the earlier of January 1, 2023, or January 1 following three years, consecutive or nonconsecutive, in which the average annual price per barrel for Alaska North Slope crude oil for sale on the United States West Coast is more than $70. The Alaska Oil and Gas Conservation Commission shall determine the commencement of regular production for purposes of this subsection. A reduction under this subsection may not reduce the gross value at the point of production below zero.

*** Sec. 34.** AS 43.55.160(h) is amended to read:

(h) For oil produced on and after January 1, 2022, except as provided in (b), (f), and (g) of this section, for the purposes of **AS 43.55.011** [AS 43.55.011(e)(3)], the annual production tax value of oil taxable under **AS 43.55.011** [AS 43.55.011(e)] produced by a producer during a calendar year

(1) from leases or properties in the state that include land north of 68 degrees North latitude**, other than major oil fields,** is the gross value at the point of production of that oil, less the producer's lease expenditures under AS 43.55.165 for

the calendar year incurred to explore for, develop, or produce oil and gas deposits located in the state north of 68 degrees North latitude or located in leases or properties in the state that include land north of 68 degrees North latitude, as adjusted under AS 43.55.170;

(2) before or during the last calendar year under AS 43.55.024(b) for which the producer could take a tax credit under AS 43.55.024(a), from leases or properties in the state outside the Cook Inlet sedimentary basin, no part of which is north of 68 degrees North latitude, other than leases or properties subject to AS 43.55.011(p), is the gross value at the point of production of that oil, less the producer's lease expenditures under AS 43.55.165 for the calendar year incurred to explore for, develop, or produce oil and gas deposits located in the state outside the Cook Inlet sedimentary basin and south of 68 degrees North latitude, other than oil and gas deposits located in a lease or property that includes land north of 68 degrees North latitude or that is subject to AS 43.55.011(p) or, before January 1, 2027, from which commercial production has not begun, as adjusted under AS 43.55.170;

(3) from leases or properties subject to AS 43.55.011(p) is the gross value at the point of production of that oil, less the producer's lease expenditures under AS 43.55.165 for the calendar year incurred to explore for, develop, or produce oil and gas deposits located in leases or properties subject to AS 43.55.011(p) or, before January 1, 2027, located in leases or properties in the state outside the Cook Inlet sedimentary basin, no part of which is north of 68 degrees North latitude from which commercial production has not begun, as adjusted under AS 43.55.170;

(4) from leases or properties in the state no part of which is north of 68 degrees North latitude, other than leases or properties subject to (2) or (3) of this subsection, is the gross value at the point of production of that oil less the producer's lease expenditures under AS 43.55.165 for the calendar year incurred to explore for, develop, or produce oil and gas deposits located in the state south of 68 degrees North latitude, other than oil and gas deposits located in a lease or property in the state that includes land north of 68 degrees North latitude, and excluding lease expenditures that are deductible under (2) or (3) of this subsection or would be deductible under (2) or (3) of this subsection if not prohibited by (b) of this section, as adjusted under

AS 43.55.170; a separate annual production tax value shall be calculated for

(A) oil produced from each lease or property in the Cook Inlet sedimentary basin;

(B) oil produced from each lease or property outside the Cook Inlet sedimentary basin, no part of which is north of 68 degrees North latitude, other than leases or properties subject to (3) of this subsection;

(5) for each major oil field in the state is the gross value at the point of production of that oil, less the lease expenditures allocated to the major oil field under AS 43.55.165 for the calendar year incurred to explore for, develop, or produce oil and gas deposits located in the major oil field, as adjusted under AS 43.55.170.

*** Sec. 35.** AS 43.55.160 is amended by adding new subsections to read:

(i) For oil and gas produced on and after January 1, 2021, and before January 1, 2022, except as provided in (b), (f), and (g) of this section, for the purposes of AS 43.55.011, the annual production tax value of taxable oil or gas produced during a calendar year in a category for which a separate annual production tax value is required to be calculated under this subsection is the gross value at the point of production of that oil or gas taxable under AS 43.55.011, less the producer's lease expenditures under AS 43.55.165 for the calendar year applicable to the oil or gas in that category produced by the producer during the calendar year, as adjusted under AS 43.55.170. A separate annual production tax value shall be calculated for

(1) oil and gas produced from leases or properties in the state that include land north of 68 degrees North latitude, other than

(A) oil produced from a major oil field; and

(B) gas produced before 2022 and used in the state;

(2) oil and gas produced from leases or properties in the state outside the Cook Inlet sedimentary basin, no part of which is north of 68 degrees North latitude and that qualifies for a tax credit under AS 43.55.024(a) and (b); this paragraph does not apply to

(A) gas produced on and after January 1, 2021, and before 2022 and used in the state; or

(B) oil and gas subject to AS 43.55.011(p);

(3) oil produced on and after January 1, 2021, and before 2022 from each lease or property in the Cook Inlet sedimentary basin;

(4) gas produced on and after January 1, 2021, and before 2022 from each lease or property in the Cook Inlet sedimentary basin;

(5) gas produced on and after January 1, 2021, and before 2022 from each lease or property in the state outside the Cook Inlet sedimentary basin and used in the state, other than gas subject to AS 43.55.011(p);

(6) oil and gas subject to AS 43.55.011(p) produced from leases or properties in the state;

(7) oil and gas produced from leases or properties in the state no part of which is north of 68 degrees North latitude, other than oil or gas described in (2), (3), (4), (5), or (6) of this subsection;

(8) oil produced from a major oil field.

(j) Except as provided in (b), (f), and (g) of this section, for the purposes of AS 43.55.011(q) and AS 43.55.020(a)(7)(E), the monthly production tax value of the taxable oil produced during a month from a major oil field is the gross value at the point of production of the oil produced by the producer from the major oil field and taxable under AS 43.55.011, less 1/12 of the producer's lease expenditures under AS 43.55.165 for the calendar year applicable to the oil produced by the producer from that major oil field, as adjusted under AS 43.55.170. For the purposes of the calculation under this subsection, a reduction in the gross value at the point of production may apply for oil subject to AS 43.55.160(f) and (g).

*** Sec. 36.** AS 43.55.165(a) is amended to read:

(a) For purposes of this chapter, a producer's lease expenditures for a calendar year are

(1) costs, other than items listed in (e) of this section, that are

(A) incurred by the producer during the calendar year after March 31, 2006, to explore for, develop, or produce oil or gas deposits located within the producer's leases or properties in the state**, a major oil field in the state,** or, in the case of land in which the producer does not own an operating

right, operating interest, or working interest, to explore for oil or gas deposits within other land in the state; and

(B) allowed by the department by regulation, based on the department's determination that the costs satisfy the following three requirements:

(i) the costs must be incurred upstream of the point of production of oil and gas;

(ii) the costs must be ordinary and necessary costs of exploring for, developing, or producing, as applicable, oil or gas deposits; and

(iii) the costs must be direct costs of exploring for, developing, or producing, as applicable, oil or gas deposits;

(2) a reasonable allowance for that calendar year, as determined under regulations adopted by the department, for overhead expenses that are directly related to exploring for, developing, or producing, as applicable, the oil or gas deposits; and

(3) lease expenditures incurred in a previous calendar year, subject to (*l*) - (r) of this section, that

(A) met the requirements of AS 43.55.160(e) in the year in which the lease expenditures were incurred;

(B) have not been deducted in the determination of the production tax value of oil and gas under AS 43.55.160(a), [OR] (h), **(i), or (j)** in a previous calendar year;

(C) were not the basis of a credit under this title; and

(D) were incurred to explore for, develop, or produce an oil or gas deposit located in the state outside the Cook Inlet sedimentary basin.

*** Sec. 37.** AS 43.55.165(h) is amended to read:

(h) The department shall adopt regulations that provide for reasonable methods of allocating costs between oil and gas, between gas subject to AS 43.55.011(o) and other gas, [AND] between leases or properties**, between leases or properties and major oil fields, and between major oil fields** in those circumstances where an allocation of costs is required to determine lease expenditures

that are costs of exploring for, developing, or producing oil deposits or costs of exploring for, developing, or producing gas deposits, or that are costs of exploring for, developing, or producing oil or gas deposits located within a different **lease, property, or major oil field. A producer shall report to the department lease expenditures separately for oil subject to taxation under either AS 43.55.011(q) or (s)** [LEASES OR PROPERTIES].

*** Sec. 38.** AS 43.55.165(m) is amended to read:

(m) During a calendar year in which a taxpayer's liability under AS 43.55.011(e) is determined under AS 43.55.011(f), the maximum amount of carried-forward annual loss that a taxpayer may apply in that year is equal to the amount, when combined with the lease expenditures of the current year and any credits under this chapter, necessary to reduce the amount calculated under AS 43.55.011(e) to the equivalent amount of tax due under AS 43.55.011(f) before the application of any credits under this chapter. **During a calendar year in which a taxpayer's liability under AS 43.55.011(q) is determined under AS 43.55.011(s), the maximum amount of carried-forward annual loss that a taxpayer may apply in that year is equal to the amount, when combined with the lease expenditures of the current year and any credits under this chapter, necessary to reduce the amount calculated under AS 43.55.011(q) to the equivalent amount of tax due under AS 43.55.011(s) before the application of any credits under this chapter.** An amount of carried-forward annual loss not applied under this subsection may continue to be carried forward.

*** Sec. 39.** AS 43.55.165(n) is amended to read:

(n) A carried-forward annual loss may only be applied

(1) to determine the production tax value of oil or gas for a category for which a separate annual production tax value is required to be calculated under AS 43.55.160(a), [OR] (h), **(i), or (j)** if the lease expenditure resulting in the carried-forward annual loss was incurred in the same category;

(2) beginning in the calendar year in which regular production of oil or gas from the lease or property where the lease expenditure resulting in the **carried-forward** [CARRIED- FORWARD] annual loss was incurred commences.

* **Sec. 40.** AS 43.55.165(o) is amended to read:

(o) A carried-forward annual loss for a lease expenditure incurred on a lease, [OR] property, **or major oil field** that

(1) did not commence regular production of oil or gas before or during the year the lease expenditure was incurred decreases in value each year by one-tenth of the value of the carried-forward annual loss in the preceding year, beginning January 1 of the 11th calendar year after the lease expenditure is carried forward under (a)(3) of this section; a decrease in value under this paragraph does not apply for a year in which the department determines that regular production of oil or gas did not commence because of a natural disaster, an injunction or other court order, or an administrative order;

(2) commenced regular production of oil or gas before or during the year the lease expenditure was incurred decreases in value each year by one-tenth of the value of the carried-forward annual loss in the preceding year, beginning January 1 of the eighth calendar year after the lease expenditure is carried forward under (a)(3) of this section.

* **Sec. 41.** AS 43.55.165(r) is amended to read:

(r) In adopting a regulation that defines the lease, [OR] property, **or major oil field** where a lease expenditure resulting in a carried-forward annual loss is incurred for purposes of (n) and (o) of this section, the department shall include an exploration lease expenditure that is reasonably related to the lease, [OR] property, **or major oil field**.

* **Sec. 42.** AS 43.55.170 is amended by adding a new subsection to read:

(d) The department shall adopt regulations that provide for reasonable methods of allocating adjustments to lease expenditures for oil produced from a major oil field subject to taxation under AS 43.55.011(q). A producer shall report to the department adjustments to lease expenditures separately for oil subject to taxation under AS 43.55.011(q).

* **Sec. 43.** AS 43.55.895(b) is amended to read:

(b) A municipal entity subject to taxation because of this section

(1) is eligible for tax credits proportionate to its production taxable

under **AS 43.55.011** [AS 43.55.011(e)]; and

(2) shall allocate its lease expenditures in proportion to its production taxable under **AS 43.55.011** [AS 43.55.011(e)].

*** Sec. 44.** AS 43.55.900 is amended by adding a new paragraph to read:

(27) "major oil field" means a field all or part of which is north of 68 degrees North latitude that

(A) produced an average of more than 40,000 barrels of oil a day in the previous calendar year; and

(B) has produced more than 400,000,000 barrels of oil in cumulative production.

*** Sec. 45.** This Act takes effect January 1, 2021.

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STATE OF ALASKA, THIRD DISTRICT
MAY 01 2020
Clerk of the Trial Courts
By _____ Deputy

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

VOTE YES FOR ALASKA'S FAIR SHARE,

Plaintiff,

v.

KEVIN MEYER, LIEUTENANT GOVERNOR OF THE STATE OF ALASKA, and STATE OF ALASKA, DIVISION OF ELECTIONS,

Defendants.

Case No. 3AN-19-11106 CI

#3

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Vote Yes for Alaska's Fair Share ("Fair Share") moves this Court for summary judgment against the Defendants on all claims in its complaint pursuant to Alaska Civil Rule 56. Fair Share is entitled to summary judgment in its favor as there are no genuine issues of material fact regarding Fair Share's arguments, and Fair Share is entitled to judgment as a matter of law. Defendants have failed to issue a true and impartial ballot summary of the Fair

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

VOTE YES FOR ALASKA'S FAIR SHARE,

Plaintiff,

v.

KEVIN MEYER, LIEUTENANT GOVERNOR OF THE STATE OF ALASKA, and STATE OF ALASKA, DIVISION OF ELECTIONS,

Defendants.

Case No. 3AN-19-11106 CI

(1)

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT

AS 15.45.180 titled "Preparation of Ballot Title and Proposition" requires Defendant Meyer "with the assistance of the attorney general" to prepare "a true and impartial summary" for the ballot of any law proposed by initiative.[1] Pursuant to AS 15.45.180, Defendant Meyer

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[1] AS 15.45.180(a).

(5)

Exc. 0192

000049

issued a summary of the Fair Share Act initiative on October 15, 2019 ("Summary"). In doing so, Defendant Meyer adopted the summary proposed by the attorney general in Attorney General Opinion No. 2019200671 ("AGO").[2] In the AGO, the attorney general noted the Summary was intended to be used for both the signature petitions and the ballots when he stated, "[the Summary is] a ballot-ready petition title and summary to assist you in complying with AS 15.45.090(2) [the signature petition summary] and AS 15.45.180 [the ballot summary], as is our office's standard practice.[3]

The initiative sponsor, Plaintiff Vote Yes for Alaska's Fair Share ("Fair Share"), noticing multiple errors, inaccuracies, and mischaracterizations in the Summary, quickly reached out to the Defendants to discuss these problems, presented a redline version of corrections, and even offered to compensate Defendants for any additional cost of correcting the summary prior to the petition booklets being printed.[4] Counsel for the Defendants refused to even take a call from counsel for Fair Share and rejected any discussion in the absence of litigation by email.[5] As a result, Fair Share was forced to file this legal action to ensure Alaskan voters truly had a "true and impartial" summary when they voted on the Fair Share Act.

After this action was initiated and the petition signatures were reviewed and accepted, counsel for the Defendants finally agreed to discuss the flaws in the Summary. Again, counsel

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2 Exhibit A, AGO.

3 Exhibit A, AGO at 11.

4 Exhibit B, Email from Brena to Mills (October 18, 2019).

5 Exhibit C, Email from Mills to Brena (October 21, 2019).

for Fair Share sent a redline version of the Summary correcting the flaws for consideration by Defendant Meyer. To his credit, Defendant Meyer conceded and corrected two of the three problems identified in Fair Share's Complaint to this Court. Defendant Meyer subsequently sent a letter dated March 17, 2020, with an amended version of the Summary for use on the ballot ("Amended Summary").[6]

While correcting two of the three problems, the Amended Summary did not correct the third problem identified in Fair Share's Complaint to this Court concerning Section 7 of the Fair Share Act. Section 7 requires tax filings under the Fair Share Act to be a matter of public record. As did the Summary, the Amended Summary continues to suggest that Section 7 means tax filings would *not* be a matter of public record.

Rather than address the Defendant's continued failure to provide a true and impartial summary of Section 7 of the Fair Share Act, Defendants have chosen to be procedurally coy. Defendants claim the Court is now time barred from considering whether Section 7 has been mischaracterized, because Fair Share did not file a second legal action when the Defendants amended the Summary. Apparently, Defendants believe Fair Share must file a new legal action each time they amend the Summary--even when the Amended Summary continues to mischaracterize the meaning of Section 7. This is puerile. Fair Share is entitled to have this Court address whether Section 7 of the Fair Share Act has been summarized truly and

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[6] Exhibit D, Amended Summary of 19OGTX (March 17, 2020).

impartially without having to file a new legal action each time the Defendants chooses to amend the Summary.[7] The remaining issue concerning Section 7 has been fairly raised in Fair Share's Complaint, is squarely pending before this Court, and should be decided.

Defendants' strained logic underlying its procedural arguments should not go without comment. Defendants suggest without statement that the Summary was never intended to be used on the ballot and therefore Fair Share has "conflated the petition summary requirement under AS 15.45.090(a)(2) with the ballot summary requirement under AS 15.45.180."[8] This logic strays too far from the circumstances of this case. Defendant Meyer requested the attorney general's involvement and adopted the attorney general's Summary as proposed. Under the statutes, the attorney general's *only* role in the initiative process is to assist Defendant Meyer in preparing a "true and impartial" summary for the *ballots* under AS 15.45.180(a). There is not a statutory role for the attorney general's involvement in preparing "an impartial summary" for the *petitions* under AS 15.45.090(a)(2). Indeed, there was only one AGO issued in this case, and it was in support of the Summary (not the Amended Summary), and it expressly

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[7] This matter was still pending, so any such second complaint would have been consolidated into this case regardless. Under Alaska Civil Rule 42(a), judges are given clear authority to consolidate cases involving a common question of law or fact that are pending before the court, and "[n]othing in Rule 42 suggests that the legal theories of consolidated cases must be identical in order for a judge to consolidate them." *Baseden v. State*, 174 P.3d 233, 242 (Alaska 2008). Here, the ample commonality and identity between factual and legal issues would have made consolidation obvious.

[8] Defendants' Memorandum in Support of Summary Judgment Motion at 3 (May 1, 2020).

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insists the Summary it proposed was intended to be used for *both* the petitions and the ballots. Clearly, Defendants intended the Summary to be used for both the petitions and the ballots from the beginning.[9] It is Defendants, and not Fair Share, who have expressly and repeatedly conflated the summary requirements of petitions and ballots to suit their procedural shenanigans.

I. ARGUMENT

A. This case was not mooted simply on Defendants' say-so, and there was no need to file a new complaint with this matter still pending after Defendants chose to concede some but not all of Fair Share's claims.

To avoid the merits of their shifting summaries, Defendants offer this proposition:

> Petition summaries and ballot summaries may, but are not legally required to, mirror one another. Nothing in state law dictates that the two summaries be identical. The lieutenant governor is authorized to amend language that appeared on a petition summary when later crafting a ballot summary—so long as it remains impartial and accurate and otherwise meets the requirements of AS 15.45.180 and AS 15.80.006—if, for example, the modified language more clearly conveys the purpose of the ballot proposition to help voters make an informed decision. Thus, although similar, the petition summary and ballot summary cannot be conflated, and the sponsor's legal challenge to the language in one cannot be grafted onto the language of the other.[10]

Again, this was how the Summary was presented: "a ballot-ready petition title and summary to assist you in complying with AS 15.45.090(2) and AS 15.45.180, as is our office's standard practice. Under AS 15.45.180, a ballot proposition must include a `true and impartial

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[9] *See* n.3, *supra.*

[10] Defendants' Memorandum at 8.

summary of the proposed law.'"[11] Fair Share is not aware of Defendants issuing substantively different summaries for petitions and ballots as a matter of course, or, frankly, ever having done so without a legal action being filed. The very idea that Defendants have a routine practice of issuing one summary for petitions and then, after the signatures are gathered, issuing a different summary for the ballots simply strains credulity. In contrast to the Defendants' claims to this Court, the AGO was clear as to what the actual practice has been—issue one summary for both the petitions and the ballots.

Nevertheless, assuming Defendants' position, the simplest principles of equitable estoppel prevent Defendants from disavowing their own characterization that the Summary was intended for use on the ballots.[12] Nor may Defendants now ignore the facts that the attorney general has only issued one AGO and it concerns the Summary, their explicit references supporting the Summary as proper under the statutes governing ballot summaries, or their

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[11] Exhibit A, AGO at 11.

[12] A party claiming estoppel must show four elements: (1) the party to be estopped knew the facts; (2) the party to be estopped intended that its conduct be acted on or acted such that the party claiming estoppel has a right to believe it was so intended; (3) the party claiming estoppel was ignorant of the true facts; and (4) the party claiming estoppel relied on the other party's conduct to his injury. *Watkins v. U.S. Army*, 875 F.2d 699, 709 (9th Cir.1989). However, for the purposes of estoppel, "the Government is not an ordinary defendant" and to "invoke estoppel against the Government, the party claiming estoppel must show 'affirmative misconduct' as opposed to mere failure to inform or assist." *Lavin v. Marsh*, 644 F.2d 1378, 1382-83 (9th Cir.1981) (citations omitted). Here, the Defendants' representation of the summary as "ballot-ready" clearly constitutes an affirmative act that Fair Share reasonably relied upon.

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refusal to even discuss any changes to the Summary without Fair Share bringing a legal action. Defendants' position paradoxically could require Fair Share to file a new suit concerning the same issue each time they amended a summary--even if the amendment did not resolve the issue pending before the court. Defendants suffered no surprise or prejudice whatsoever that Fair Share would not be satisfied with continuing the same flawed characterization of Section 7.[13]

B. "This would mean the normal Public Records Act process would apply" is not a true and impartial summary of "shall be a matter of public record."

Section 1 of the Fair Share Act provides, "Notwithstanding Any Other Statutory Provisions to the Contrary, the Oil and Gas Production Tax in AS 43.55 Shall Be Amended as Follows[.]" In turn, Section 7 provides, "All filings and supporting information provided by each producer to the Department relating to the calculation and payment of the taxes set forth in Sections 3 and 4 shall be a matter of public record." As discussed in Fair Share's Motion to Dismiss, Defendant Meyer continues to interpose the least-credible legal interpretation of Section 7 possible when he states in the Amended Summary, "This would mean the normal

[13] *See, e.g., Dream Palace v. County of Maricopa*, 384 F.3d 990, 1000 (9th Cir. 2004) ("The question of mootness 'focuses upon whether we can still grant relief between the parties . . . an appeal is not moot if the court can fashion some form of meaningful relief....'") (quoting *In re Pattullo*, 271 F.3d 898, 901 (9th Cir. 2001)).

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Public Records Act process would apply."[14] Far from being a true and impartial summary of Section 7, Defendant Meyer's interpretative sentence would render Section 7 meaningless.

The common meaning of "matter of public record" in statute and case law is that "a matter of public record" is not confidential.[15] The relevant tax statute AS 40.25.100(a) provides that "[i]nformation in the possession of the Department of Revenue that discloses the

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[14] Exhibit D, Amended Summary at 2.

[15] *See, e.g., Downie v. Superior Court*, 888 P.2d 1306, 1308 (Alaska App. 1995) ("[T]he date set for trial is a matter of public record and cannot conceivably be considered confidential.") (quoting *State v. Bilton*, 36 Or.App. 513, 585 P.2d 50, 52 (1978)); *William E. Schrambling Accountancy Corp. v. U.S.*, 937 F.2d 1485, 1487–90 (9th Cir. 1991) (granting judgment in favor of government's position that recording of liens "made the information a matter of public record to which no reasonable expectation of privacy could attach" and no longer confidential); *Rodgers v. Hyatt*, 697 F.2d 899, 902 (10th Cir. 1983) ("It is well established under the law dealing with actions for invasion of privacy that no reasonable expectation of privacy attaches to those matters that are a matter of public record.") (citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975); Restatement (Second) of Torts, Explanatory Notes, Section 652D, comment b, at 385 (1977) ("Thus there is no liability for giving publicity to facts about the plaintiff's life that are matters of public record")); *In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 19 (C.A.1 2003) ("matters of public record are fair game in adjudicating Rule 12(b)(6) motions, and a court's reference to such matters does not convert a motion to dismiss into a motion for summary judgment") (citation omitted); *Slade v. Schneider*, 129 P.3d 465, 471, 212 Ariz. 176, 182 (Ariz. App. Div. 1 2006) ("Though no published cases interpret when the Commission makes the names, information and documents a matter of public record, we need not determine all of the Commission's actions that would result in the names, information and documents no longer being confidential because we agree with the Commission that this occurs when the Commission files the information or documents with a public tribunal."); *Havens v. State of Ind.*, 793 F.2d 143, 145 (7th Cir. 1986) ("the information elicited during Milford's cross-examination was not confidential information because it was a matter of public record."); *Lopez v. Wal-Mart Stores, Inc.*, 2012 WL 929851, at *2 (N.D. Cal. 2012) ("Only after Lopez pointed out that the consent decree was public did Wal–Mart withdraw the designation. In other cases, too, Lopez has been able to locate Wal–Mart's policies in public record and again after pointing it out, caused Wal-Mart to withdraw its "confidential" designation of documents.").

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particulars of the business or affairs of a taxpayer or other person . . . is not *a matter of public record* . . . . The information *shall be kept confidential* except when its production is required in an official investigation, administrative adjudication . . . or court proceeding" (emphasis added). If a document is "a matter of public record," the document is available to the public and not confidential.[16]

Recognizing this correct interpretation, the AGO states: "[Section 7] would conflict with current law that actually makes it a crime to disclose confidential tax documents. [Footnote omitted] Based on the 'Notwithstanding . . .' language, we assume this provision is intended to supersede the existing statute for any tax documents submitted for areas falling under section 2 of the initiative bill."[17] While this statement in the AGO is offering an interpretation rather than a summary, it does offer exactly the correct interpretation of Section 7.

Unfortunately, the voice in the AGO that offered the correct interpretation was not the voice that guided the Summaries. In fact, the Summaries foreclose the acknowledged

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[16] *See also, e.g.,* AS 27.21.100(c)(2) (trade secrets, commercial or financial information, and geologic information specifically identified as confidential by the applicant and determined by the commissioner to be not essential for public review *shall be kept confidential and not be made a matter of public record.*" (emphasis added)); AS 44.88.215(a) ("unless the records or information were *a matter of public record* before submittal to the authority, the following records and information *shall be kept confidential* if the person supplying the records or information or the project, bond, loan, or guarantee applicant or borrower requests confidentiality . . . . (emphasis added)); AS 39.90.010 ("A public employee may not be dismissed, demoted, suspended, laid off, or otherwise made subject to any disciplinary action for communicating *matters of public record* ... [a] violation of this section is a misdemeanor." (emphasis added)).

[17] Exhibit A, AGO at 6.

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interpretation of the initiative sponsors entirely and are not true and impartial. The Summary states, "The Act would also make all tax documents relating to the calculation and payment of the new taxes a matter of public record. *This would mean the documents would be reviewed under the normal Public Records Act process, and any information that needed to be withheld, for example for privacy or balance-of-interests reasons, would be withheld*" (emphasis added). In turn, the voice in the AGO goes on to suggest that the application of the Public Records Act would mean confidentiality *"would likely apply to most, if not all, of the tax documents."*

The Amended Summary simply shortens the erroneous sentence above to read: "This would mean the normal Public Records Act process would apply."[18] Given the AGO's observation that the normal Public Records Act process would result in "most, if not all, of the tax documents" remaining confidential,[19] Defendant Meyer's extraneous interpretive sentence may only mean the tax filings would remain confidential—the exact opposite of the plain meaning, the obvious intent of the language, the publicly stated intentions of the sponsors, and the AGO's own acknowledgment of the sponsors' intention. Far from being a true and fair summary of Section 7, Defendant Meyer's remaining interpretative sentence in the Amended Summary would render Section 7 entirely meaningless because there would be no change whatsoever to the confidential status of tax filings under the Fair Share Act.

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[18] Exhibit D, Amended Summary at 2.

[19] Exhibit A, AGO at 6.

In their Motion, Defendants argue that their reference to the Public Records Act is

> particularly important here because the initiative did not include any express references to Alaska Statutes apart from a general reference to `AS 43.55.' Nowhere in the initiative is the Public Records Act expressly amended or even cross-referenced. Instead, the initiative includes a statement that "Notwithstanding Any Other Statutory Provisions to the Contrary, the Oil and Gas Production Tax in AS 43.55 Shall Be Amended as Follows." Pl. Complaint, Ex. A. The initiative later declares "All filings and supporting information provided by each producer to the Department [of Revenue] relating to the calculation and payment of the taxes set forth in Sections 3 and 4 shall be a matter of public record." Pl. Complaint, Ex. A. The use of the "notwithstanding" clause in the initiative, when combined with the lack of any express cross-references to
> the Public Records Act in the initiative sections amending AS 43.55, obscures the scope and import of the proposed law to voters unfamiliar with the law. The ballot summary language provides the necessary transparency for voters through the reference to the normal Public Records Act process.

Fair Share notes the irony in Defendants' advocating transparency when the legal interpretation included in their summaries perpetuates the opposite in contravention of the sponsors' acknowledged intention. As the Fair Share Act plainly states, as the AGO acknowledged, and as has been made clear from the start of the public campaign for the initiative, the Fair Share Act is explicitly intended to make all relevant filings and documentation a matter of public record. But if Defendants only intended to make the public aware that the Fair Share Act would affect the Public Records Act, and did only that in their summary, that would be one matter. Here, Defendant has placed a legal interpretation of Section 7 that is plainly contrary to its text and intent. Defendants go on to either misunderstand or misstate Fair Share's position on the Public Records Act:

> The Public Records Act does not mandate that all public records must be disclosed in their entirety as sponsors suggest. The Public Records Act in in AS 40.25.120(a) provides a right to inspect public records with enumerated exceptions. The initiative

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> would amend the statutory taxpayer confidential status of certain information. The initiative does not repeal or amend any exceptions listed in AS 40.25.120(a) nor can it change the constitutional right to privacy. Thus even if not confidential taxpayer information anymore, records required to be kept confidential under the constitution or another statute would not be disclosed. In short, the normal review process prior to disclosure would apply to taxpayer information made a public record by the initiative. This is important information for voters to know as they make a decision on whether to approve or reject the initiative.[20]

The Fair Share Act's only interaction with the Public Records Act is to remove all relevant filings and documents from the scope thereof. That Defendants advocate a different legal interpretation of "matter of public record" than Fair Share intends is clear. But it is not for the Lieutenant Governor to insert his preferred legal interpretation into the ballot summary. He is required to summarize to a true and impartial standard, even if he speculates that constitutional privacy concerns may be implicated (Defendants suggest such concerns in passing without elaboration[21]). Any such concerns would be resolved as necessary in the proper forum after the Fair Share Act becomes law. This Court should not allow Defendants to place a thumb on the scale of future resolution by inserting their legal interpretation of Section 7 into the ballot summary.

II. CONCLUSION

There are no genuine issues of material fact in this dispute, Fair Share is entitled to summary judgment as a matter of law, and Defendants are not. Neither the Summary nor the Amended Summary used by Defendant Meyer satisfies the true and impartial standard. Fair

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[20] Defendants' Memorandum at 20-21.

[21] *Id.* at 21.

Share timely appealed the mischaracterization of Section 7 in the Summary. Defendants' Amended Summary continues to mischaracterize Section 7 and does not pretend to resolve the issue raised in Fair Share's Complaint. The characterization of Section 7 is squarely before this Court and should be substantively addressed and resolved. Lest the forest be lost in the trees, of paramount importance is for this Court to ensure the voters of Alaska have a true and impartial summary of Section 7 on their ballots when they vote this November. This Court should not permit this paramount goal to be frustrated by procedural arguments advanced by public officials opposed to the Fair Share Act.

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RESPECTFULLY SUBMITTED this 15th day of May, 2020.

BRENA, BELL & WALKER, P.C.
Counsel for Plaintiff

By: *//s// Robin Brena*
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Jon S. Wakeland, Alaska Bar No. 0911066
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Certificate of Service
I hereby certify that a true and correct copy of the foregoing document was served by e-mail upon the following this 15th day of May, 2020.

State of Alaska
Department of Law
c/o Cori Mills, Assistant Attorney General
P.O. Box 110300
Juneau, Alaska 99811-0300
E-mail: cori.mills@alaska.gov

By: *//s// Melody Nardin*
Melody Nardin

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Section 6 would provide that the tax due in a month shall be the greater of the tax levied under section 3 (alternative gross minimum tax) or section 4 (tax on production tax value).

As mentioned above, the plain meaning of section 6 is that the tax due will be determined by the greater of the calculation in sections 3 or 4, not section 4 plus some other tax. The likely result would be that section 4 is never implemented because the ten to fifteen percent alternative minimum tax is on the gross value and the fifteen percent under section 4 is on the net value. There is no legislative history to help determine the intent for these provisions, and it would be difficult to insert language into the initiative bill or insert another statute that is not expressly referenced.

Section 7 would establish that all filings and supporting information provided to the Department of Revenue relating to the tax calculations of sections 3 and 4 shall be a matter of public record. Although this could raise concerns over the constitutional right to privacy, the reality is that most of the tax documents would still likely be protected from disclosure. This is because making the tax documents "a matter of public record" simply means the Public Records Act applies, instead of being exempt from it. Under the Public Records Act, the Department of Revenue would have to review all the requested records and redact those portions that should be protected for reasons of privacy, proprietary information, or balance of interests, for example. These protections would likely apply to most, if not all, of the tax documents.

This section would conflict with current law that actually makes it a crime to disclose confidential tax documents.[5] Based on the "Notwithstanding..." language, we assume this provision is intended to supersede the existing statute for any tax documents submitted for areas falling under section 2 of the initiative bill. This could be difficult to implement for the Department of Revenue because a document may contain information about multiple areas or require multiple different tax filings in order to keep them separate.

Section 8 states that nothing in the proposed legislation requires a dedication of revenue, enactment of local or special legislation, or performance of an unconstitutional act. The section would provide that the legislature could, but is not required to, use the revenues obtained from enactment of this act for essential government services, capital projects, the permanent fund, and permanent fund dividends.

Section 9 is a severability clause.

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5 AS 43.05.230.

II. Analysis.

Under AS 15.45.070, the lieutenant governor must review an application for a proposed initiative bill within 60 calendar days of receipt and "certify it or notify the initiative committee of the grounds for denial." The application for the 19OGTX initiative was filed with the Division of Elections on August 16, 2019. The sixtieth calendar day after the filing of the initiative is Tuesday, October 15, 2019.

Under AS 15.45.080, certification shall be denied only if: "(1) the proposed bill to be initiated is not confined to one subject or is otherwise not in the required form; (2) the application is not substantially in the required form; or (3) there is an insufficient number of qualified sponsors."

A. Form of the proposed initiative bill.

In evaluating an application for an initiative bill, you must determine whether the application is in the "proper form."[6] Specifically, you must decide whether the application complies with "the legal procedures for placing an initiative on the ballot, and whether the initiative contains statutorily or constitutionally prohibited subjects which should not reach the ballot."[7]

The form of an initiative bill is prescribed by AS 15.45.040, which requires four things: (1) that the bill be confined to one subject; (2) that the subject be expressed in the title; (3) that the bill contain an enacting clause stating: "Be it enacted by the People of the State of Alaska"; and (4) that the bill not include prohibited subjects. The list of prohibited subjects is found in article XI, section 7 of the Alaska Constitution and AS 15.45.010. An initiative bill includes a prohibited subject when it makes or repeals appropriations; enacts local or special legislation; dedicates revenue; or creates courts, defines their jurisdiction, or prescribes their rules.[8] You may deny certification only if the measure violates one or more of these restrictions, or if "controlling authority establishes its unconstitutionality."[9]

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6 Alaska Const. art. XI, § 2.

7 *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 87 n.7 (Alaska 1988).

8 AS 15.45.010; *see also* Alaska Const. art. XI, § 7 (prohibiting dedicating revenue, creating courts, defining court jurisdiction or prescribing court rules).

9 *Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 900 n. 22 (Alaska 2003) (this is an exception to the general rule that the court will not review the constitutionality of legislation or initiative pre-enactment; the example given is a bill requiring segregation in direct violation of *Brown v. Board of Educ. Of Topeka, Kan.*, 349 U.S. 294 (1955)).

The initiative bill meets all four requirements of AS 15.45.040. It is confined to one subject—oil and gas taxation. The subject is expressed in the title, and the bill has the required enacting clause. Finally, it does not include any of the prohibited subjects and is not clearly unconstitutional under existing authority.

When evaluating the initiative bill, we carefully considered whether the initiative bill would enact local or special legislation and whether it violates the single-subject rule. When reviewing ballot initiatives, the court will "construe voter initiatives broadly so as to preserve them whenever possible. However, whether an initiative complies with article XI, section 7's limits on the right of direct legislation requires careful consideration."[10]

In order to determine if the initiative bill would enact special or local legislation, the court first considers "whether the proposed legislation is of general, statewide applicability."[11] If the answer is yes, then there is no violation. But if the answer is no, you must then ask "whether the initiative nevertheless bears a fair and substantial relationship to legitimate purposes."[12] This is similar to the most deferential standard applied in an equal protection review.[13] The court has also said the legislation or initiative bill "need not operate evenly on all parts of the state to avoid being classified as local or special."[14]

19OGTX further divides what is currently known as the North Slope segment for purposes of the oil and gas production tax. Instead of one North Slope segment, the initiative bill appears to divide the North Slope into "fields, units and nonunitized reservoirs"[15] that meet the applicability section and other areas that do not meet the applicability section. The purpose of these changes is presumably to increase the State's share of money from oil and gas development. Oil and gas development generally is a matter of statewide concern and will have statewide impacts both in the private sector and the public sector. Previous court cases have found that maximizing the economic benefits of oil and gas production to the people of Alaska is a legitimate state purpose.[16] This initiative bill would further divide the North Slope segment with the goal of bringing

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10 *Hughes v. Treadwell*, 341 P.3d 1121, 1125 (Alaska 2015).

11 *Id.* at 1131.

12 *Ibid.*

13 *Ibid.*

14 *Boucher v. Engstrom*, 528 p.2d 456, 463 (Alaska 1974).

15 These terms are not currently found in the Department of Revenue statutes or regulations governing taxation. Likewise, the term "nonunitized reservoir" is not currently found in the Department of Natural Resources statutes or regulations.

16 *Baxley v. State*, 958 P.2d 422, 431 (Alaska 1998).

more money into the state treasury, which in turn funds government services. Similar to bills amending Northstar oil and gas leases,[17] authorizing a three-way land exchange,[18] and excluding Fairbanks and Anchorage from being the capital,[19] this initiative bill appears to bear a fair and substantial relationship to the legitimate purpose of developing the State's oil and gas resources in the interest of all Alaskans. Therefore, it is not considered special or local legislation.

We also evaluated whether 19OGTX violates the single-subject rule because it includes both a substantive change to oil and gas laws as well as a change to the way tax records are treated and a statement on what the revenue could be spent on. Article II, section 13 of the Alaska Constitution requires that "[e]very bill shall be confined to one subject." In the context of initiative bills, the single-subject rule is intended to protect "the voters' ability to effectively exercise their right to vote by requiring that different proposals be voted on separately."[20] Confining initiative bills to one subject assures both that voters can "express their will through their votes more precisely," and "prevents the adoption of policies through stealth or fraud, and prevents the passage of measures lacking popular support by means of log-rolling."[21] Log-rolling, the Court has explained, "consists of deliberately inserting in one bill several dissimilar or incongruous subjects in order to secure the necessary support for passage of the measure."[22]

We conclude that 19OGTX does not violate the single-subject rule because the provisions all relate to the administration of the proposed oil and gas tax. Section 7 of the initiative bill relates specifically to the tax records filed under "the calculation and payment of the taxes set forth in Section 3 and 4." It is not a separate and distinct proposal on public records, but rather implements how documents that are created because of the new tax should be handled. Under existing law, these documents are all confidential and are not considered public records.[23] This initiative bill would make the

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17 *Id.* at 430-431.

18 *State v. Lewis*, 559 P.2d 630, 643 (Alaska 1977).

19 *Boucher v. Engstrom*, 528 P.2d 456, 462-64 (Alaska 1974).

20 *Id.*

21 *Id.*

22 *Gellert*, 522 P.2d at 1122; see also Proceedings of the Alaska Constitutional Convention at 1746-47 (discussion of the single-subject requirement and the concern over log-rolling).

23 AS 40.25.100, 43.05.230.

tax documents filed under the new tax regime public records and subject to the Public Records Act, including the protections provided under the Public Records Act like proprietary information and balance of interests.[24]

Additionally, section 8 of the initiative bill does not amount to a separate and distinct subject. Section 8 simply states the legal reality that revenues generated by the new oil and gas tax "*could* be used to fund essential government services, capital projects, the permanent fund, and permanent fund dividends." It does not attempt to dedicate the funds to any particular purpose or create a new program that would be funded by this money. Oil and gas tax and royalties make up the majority of the money in the state general fund, which is then used to pay for the State's budget. Section 8 of the bill is acknowledging this fact and does not create any new distinct proposal that would amount to log-rolling, even if the language is clearly included to entice people to vote for the initiative bill.

The conclusion that an initiative bill satisfies the constitutional and statutory requirements does not speak to the initiative bill's ultimate constitutionality or workability. The Alaska Supreme Court "refrain[s] from giving pre-enactment opinions on the constitutionality of statutes, whether proposed by the legislature or by the people through their initiative power, since an opinion on a law not yet enacted is necessarily advisory."[25] The question is about timing—when is a lawsuit challenging an initiative bill proper, and the answer is often after the initiative bill has been enacted. As detailed in the discussion above regarding the initiative bill's provisions, 19OGTX raises many questions that cannot be answered until the revisor of statutes places the initiative bill in the statutes and the Department of Revenue adopts regulations interpreting the new statutory provisions. At this stage, "all doubts as to all technical deficiencies or failure to comply with the exact letter of procedure will be resolved in favor of the" liberal construction of the initiative bill.[26] This in no way forecloses, and we do not opine on, future litigation over the constitutionality or interpretation of the initiative bill post-enactment. There are significant constitutional issues that can be argued with respect to this bill. However, these issues must be addressed by the courts post-enactment if legal challenges are made.

B. Form of the application.

The form of an initiative application is prescribed by AS 15.45.030, which provides that the application must include the

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24 AS 40.25.120(4), (12), (14)

25 *Kohlhaas v. State*, 147 P.3d 714, 717 (2006).

26 *Yute Air Alaska Inc. v. McAlpine*, 698 P.2d 1173, 1181 (Alaska 1974).

(1) proposed bill;

(2) printed name, the signature, the address, and a numerical identifier of not fewer than 100 qualified voters who will serve as sponsors; each signature page must include a statement that the sponsors are qualified voters who signed the application with the proposed bill attached; and

(3) designation of an initiative committee consisting of three of the sponsors who subscribed to the application and represent all sponsors and subscribers in matters relating to the initiative; the designation must include the name, mailing address, and signature of each committee member.

The application on its face meets the first requirement, as well as the latter portion of the second requirement regarding the statement on each signature page. With respect to the first clause of the second requirement, we understand the Division of Elections has reviewed the sponsor signatures and determined that the application contains the signatures and addresses of 163 qualified voters. The application also designates three sponsors to serve on an initiative committee, thus satisfying the third requirement. Therefore, the application is in the proper form.

III. Proposed ballot and petition summaries.

We have prepared a ballot-ready petition title and summary to assist you in complying with AS 15.45.090(2) and AS 15.45.180, as is our office's standard practice. Under AS 15.45.180 a ballot proposition must include a "true and impartial summary of the proposed law." That provision also requires that an initiative's title be limited to 25 words, and that the number of words in the body of the summary be limited to the number of sections in the proposed law multiplied by fifty. "Section" is defined as "a provision of the proposed law that is distinct from other provisions in purpose or subject matter."

The bill has nine sections, which would allow the number of words in the summary not to exceed 450. Below is a summary with 20 words in the title and 396 words in the summary, which we submit for your consideration.

An Act changing the oil and gas production tax for certain fields, units, and nonunitized reservoirs on the North Slope

This act would change the oil and gas production tax for areas of the North Slope where the company produced more than 40,000 barrels of oil per day in the prior year and/or more than 400 million barrels total. It is unclear whether the area has to meet both the 40,000 and 400,000 million thresholds or just one of them. The new areas would be divided up based on "fields, units, and nonunitized reservoirs" that meet the production threshold. The Act does not define what a field or unit is. For any areas that meet the production threshold, the tax would be the greater of one of two new taxes.

(1) One tax would be a tax on the gross value at the point of production of the oil at a rate of 10% when oil is less than $50 per-barrel. This tax would increase to a maximum of 15% when oil is $70 per-barrel or higher. No deductions could take the tax below the 10% to 15% floor.

(2) The other tax would be based on a calculation of a production tax value for the oil that would allow lease expenditure and transportation cost deductions. This tax on production tax value would be calculated based on the difference between the production tax value of the oil and $50. The difference between the two would be multiplied by the volume of oil, and then that amount would be multiplied by 15%. The existing per-taxable-barrel credit would not apply. The Act uses the term "additional tax" but it does not designate what tax is in addition to. The result is that this tax would likely always be less than the tax above.

The Department of Revenue would calculate the tax for each field, unit, or nonunitized reservoir on a monthly basis. Taxes are currently calculated on an annual basis, with monthly estimated payments. Since these new taxes would only apply to certain areas, a taxpayer would still have to submit annual taxes for the areas where the new taxes do not apply.

The Act would also make all tax documents relating to the calculation and payment of the new taxes a matter of public record. This would mean the documents would be reviewed under the normal Public Records Act process, and any information that needed to be withheld, for example for privacy or balance-of-interests reasons, would be withheld.

Should this initiative become law?

This summary has a Flesch test score of 54.7. We believe the summary satisfies the target readability standards of AS 15.80.005.[27]

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[27] Under AS 15.80.005(b), "The policy of the state is to prepare a neutral summary that is scored at approximately 60." While this summary is slightly below the target readability score of 60, the Alaska Supreme Court has upheld ballot summaries scoring as

IV. Conclusion.

Despite the failure to follow technical drafting requirements, the proposed bill and application are in the proper form for an initiative and the application complies with the constitutional and statutory provisions governing the use of the initiative. We therefore recommend that you certify the initiative bill application and notify the initiative committee of your decision. You may then begin to prepare a petition under AS 15.45.090.

Please contact us if we can be of further assistance to you on this matter.

Sincerely,

KEVIN J. CLARKSON
ATTORNEY GENERAL

By:

Cori Mills
Assistant Attorney General

---

low as 33.8 for a complicated ballot initiative. *See* 2007 Op. Att'y Gen. (Oct. 17; 663070179); *Pebble*, 215 P.3d at 1082-84.

From:	Robin O. Brena
To:	cori.mills@alaska.gov
Cc:	Robin O. Brena
Subject:	Summary of the Fair Share Act
Date:	Friday, October 18, 2019 9:00:00 AM
Attachments:	image001.png 19OGTX Summary.2019-10-17.D01.ROB.docx

Ms. Mills:

It is often the case that the initiative sponsors are consulted when preparing a summary of the initiative. Our common goal is to have the summary of the Fair Share Act meet the standards for an initiative summary and be presented clearly and honestly to the people of Alaska as a fair, concise, true, and impartial statement of the intent of the proposed measure.

Toward that goal, we have attached a few redlines of the summary recommended in the letter to the Lt. Governor. These redlines will more clearly and honestly present the proposed Act to the people of Alaska. Given the tight printing schedule, please give me a call this morning so we may discuss these redlines. We are willing to reimburse the State for any additional printing costs associated with the changes we have proposed. Thank you for your consideration, and I look forward to your call. Robin

Robin O. Brena, Esq.
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From: Mills, Cori M (LAW)
To: Robin O. Brena
Subject: Re: Summary of the Fair Share Act
Date: Monday, October 21, 2019 5:27:40 PM

Mr. Brena, after consulting with the Attorney General and the Division of Elections, we have to respectfully decline your request. I think there is a misunderstanding about the sponsors' role in the creation of petition booklets. This is a statutory duty carried out by the Lt. Governor through the Division of Elections.

Once the decision is certified, the Division finalizes the summary and sends off the booklets for printing. The petition booklets will be completed tomorrow by the printer, from my understanding. We believe the summary meets the statutory requirements of neutrality and readability.

The prior instances where we have gotten feedback on a summary before finalizing is in the context of ongoing litigation over certification.

I apologize for the delay in responding. I traveled to Anchorage for a court hearing and have not had an opportunity to sit down and respond until now.

Cori Mills
Assistant Attorney General
Department of Law

On Oct 21, 2019, at 9:10 AM, Robin O. Brena <rbrena@brenalaw.com> wrote:

> Ms. Mills:
>
> Robin asked that I touch base with you regarding his email dated October 18, 2019. He would like to meet with you today, if you are available. Please reply with your availability.
>
> Thank you,
>
> **PRIVILEGED AND CONFIDENTIAL**
>
> **Melody Nardin**
> **Legal Assistant**
> <image001.jpg>
>
> 810 N Street, Suite 100
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>
> ** The information contained in this email is intended solely for the use of the individual or entity to whom it is addressed and others authorized to receive it. It may contain confidential or legally privileged information. If you are not the intended recipient, you are hereby notified that disclosure, copying, distribution, or taking any action in reliance on the contents of this information is strictly prohibited and may be unlawful. If you have received this communication in error, please notify the sender immediately by responding to this email and then delete it from your system. Thank you.

Lieutenant Governor Kevin Meyer
STATE OF ALASKA

March 17, 2020

Robin O. Brena
810 N Street, Suite 100
Anchorage, AK 99501

Re: 19OGTX – Fair Share Initiative

Mr. Brena:

I have reviewed your petition for the initiative entitled "An Act changing the oil and gas production tax for certain fields, units, and nonunitized reservoirs on the North Slope" and have determined that the petition was properly filed. My notice of proper filing is enclosed. Specifically, the petition was signed by qualified voters from all 40 house districts equal in number to at least 10 percent of those who voted in the preceding general election; with signatures from at least 30 house districts matching or exceeding seven percent of those who voted in the preceding general election in the house district. The Division of Elections verified 39,174 voter signatures, which exceeds the 28,501 signature requirement based on the 2018 general election. A copy of the Petition Statistics Report prepared by the Division of Elections is enclosed.

With the assistance of the attorney general, I have prepared the following ballot title and proposition that meets the requirements of AS 15.45.180:

An Act changing the oil and gas production tax for certain fields, units, and nonunitized reservoirs on the North Slope

This act would change the oil and gas production tax for areas of the North Slope where a company produced more than 40,000 barrels of oil per day in the prior year and more than 400 million barrels total. The new areas would be divided up based on "fields, units, and nonunitized reservoirs" that meet the production threshold. The act does not define these terms. For any areas that meet the production threshold, the tax would be the greater of one of two new taxes.

(1) One tax would be a tax on the gross value at the point of production of the oil at a rate of 10% when oil is less than $50 per-barrel. This tax would increase to a maximum of 15% when oil is $70 per-barrel or higher. No deductions could take the tax below the 10% to 15% floor.

(2) The other tax, termed an "additional tax," would be based on a calculation of a production tax value for the oil that would allow lease expenditure and transportation cost deductions. This tax on production tax value would be calculated based on the difference between the production tax value of the oil and $50. The difference between the two would be multiplied by the volume of oil, and then that amount would be multiplied by 15%. The existing per-taxable-barrel credit would not apply. The act uses the term "additional tax" but it does not specify what the new tax is in addition to.

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The tax would be calculated for each field, unit, or nonunitized reservoir on a monthly basis. Taxes are currently calculated on an annual basis, with monthly estimated payments. Since these new taxes would only apply to certain areas, a taxpayer would still have to submit annual taxes for the areas where the new taxes do not apply.

The act would also make all filings and supporting information relating to the calculation and payment of the new taxes "a matter of public record." This would mean the normal Public Records Act process would apply.

Should this initiative become law?

This ballot proposition will appear on the election ballot of the first statewide general, special, or primary election that is held after (1) the petition has been filed; (2) a legislative session has convened and adjourned; and (3) a period of 120 days has expired since the adjournment of the legislative session. Barring an unforeseen special election or adjournment of the current legislative session occurring on or before April 19, 2020, this proposition will be scheduled to appear on the general election ballot on the November 3, 2020 general election. If a majority of the votes cast on the initiative proposition favor its adoption, I shall so certify and the proposed law will be enacted. The act becomes effective 90 days after certification.

Please be advised that under AS 15.45.210, this petition will be void if I, with the formal concurrence of the attorney general, determine that an act of the legislature that is substantially the same as the proposed law was enacted after the petition has been filed and before the date of the election. I will advise you in writing of my determination in this matter.

Please be advised that under AS 15.45.240, any person aggrieved by my determination set out in this letter may bring an action in the superior court to have the determination reversed within 30 days of the date on which notice of the determination was given.

If you have questions or comments about the ongoing initiative process, please contact my staff, April Simpson, at (907) 465-4081.

Sincerely,

Kevin Meyer
Lieutenant Governor

Enclosures

cc: Kevin G. Clarkson, Attorney General
Gail Fenumiai, Director of Elections

From: ivy.greever@alaska.gov
To: ANC_civil@akcourts.us
Cc: cori.mills@alaska.gov, mary.gramling@alaska.gov, jwakeland@brenalaw.com, rbrena@brenalaw.com
Subject: 3AN-19-11106 CI - Defendants' Opposition to Plaintiff's Motion for Summary Judgment
Date: 5/15/2020 10:03:09 AM

jnu.law.ecf@alaska.gov

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

FILED IN THE TRIAL COURTS
STATE OF ALASKA, THIRD DISTRICT

MAY 15 2020

Clerk of the Trial Courts
By _____ Deputy

VOTE YES FOR ALASKA'S FAIR SHARE, Plaintiff, v. KEVIN MEYER, LIEUTENANT GOVERNOR OF THE STATE OF ALASKA, and STATE OF ALASKA, DIVISION OF ELECTIONS, Defendants.	Case No. 3AN-19-11106 CI

(3)

OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This should be a straight forward case with two easily-defined legal questions: (1) is the challenge to the ballot summary timely, and (2) does the sentence in the ballot summary stating, "This means the normal Public Records Act process would apply," meet the legal requirements of accuracy and impartiality. Defendants Lieutenant Governor Kevin Meyer and the Division of Elections (collectively "the State") assert the challenge is untimely because sponsors failed to challenge the ballot summary within 30 days of notification, and the sentence about the Public Records Act accurately reflects the initiative bill's implied amendment to the confidentiality of tax records in the act. Instead of addressing how the Public Records Act sentence is somehow biased, Plaintiff Vote Yes for Alaska's Fair Share (sponsors) spend much of their brief voicing their complaints regarding the analysis in the Attorney General Opinion, unnecessarily

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impugning the character of the lieutenant governor (despite the fact that he certified the initiative application and placed it on the general election ballot), essentially campaigning for why 19OGTX should be enacted, and asking the Court to import the provisions of a 45-page legislative bill into the two-page initiative bill. None of this is relevant to the analysis of the text of the summary and should be disregarded. Instead, all that matters is that sponsors have not overcome their burden to show bias in the summary, and the sentence referring to the Public Records Act is an accurate and impartial description of one of the initiative bill's main features. For these reasons, summary judgment should be granted in favor of the State.

II. ARGUMENT

A. Sponsors appear to misunderstand the Lieutenant Governor's statutory role, the initiative process, and the purpose of the Attorney General Opinion.

Instead of focusing on the language actually in the ballot summary, sponsors try to attack the summary by inappropriately impugning the character of Lieutenant Governor Meyer with unsubstantiated assertions that he is inherently biased and pointing to allegedly biased statements made by the Department of Law in describing the initiative in the Attorney General Opinion. None of this has any relevance to whether the plain language of the summary accurately and impartially summarizes the provisions of the initiative bill, and it must be disregarded.

i. The attorney general's role is merely advisory; the lieutenant governor has the constitutional and statutory duty to determine whether a petition was properly filed and what the final ballot summary will be.

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Sponsors spend unnecessary time in their Memorandum in Support of the Motion for Summary Judgment (Pl. Memo.) taking issue with statements in the Attorney General Opinion and citing the Attorney General Opinion for the proposition that the "First Summary was clearly intended to be the only summary prepared and was to be used for signature booklets and the ballot." Pl. Memo at 2. Not only is this information irrelevant to the issue currently before the court (i.e., is the ballot summary's inclusion of the Public Records Act reference true and impartial), but it also misconstrues the advisory role of the attorney general.

The Attorney General Opinion provides guidance and legal advice to the lieutenant governor in order to assist the lieutenant governor in fulfilling his constitutional and statutory obligation to certify an initiative application.[1] As a general matter, the "attorney general is the legal advisor of the governor and other state officers."[2] As part of the attorney general's duties, the "attorney general shall... administer state legal services, including the furnishing of written legal opinions to the governor, the legislature, and all state officers and departments as the governor directs."[3] The lieutenant governor in this case, following historical practice, requested an opinion from the Department of Law on the 19OGTX initiative application and whether the initiative should be certified. Pl. Memo, Ex. B at 1 ("You asked us to review an application for an initiative bill entitled: An Act relating to the oil and gas

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1 See AS 44.23.020; AS 15.45.180.

2 AS 44.23.020(a).

3 AS 44.23.020(b)(5).

production tax, tax payments, and tax credits"). This is why at the end of the opinion, the department stated: "We therefore *recommend* that you certify the initiative bill application." Pl. Memo., Ex. B at 13 (emphasis added). The attorney general has no authority to certify an initiative application, just as he has no authority to determine what the petition summary or ballot summary ultimately look like. If the lieutenant governor wants to change the summary for either the petition or the ballot summary, that is his decision.[4]

Sponsors fail to focus on the actual language in the summary for most of their Memorandum. Instead, they assert "the AGO underlying [the summary] is replete with interpretation, speculation, critique, and other unnecessary commentary." Pl. Memo. at 14. Sponsors try to take these supposed unfair comments that *are not* in the summary and make that the basis for the summary being biased. Pl. Memo. at 14, 19 (says AGO "goes on to twist this obvious meaning"), 20-21 (calling certain phrases "strained interpretation"), 23 ("extraneous interpretive sentence may only mean the tax filings would remain confidential").

The purpose of the Attorney General Opinion in reviewing the initiative bill differs from the drafting of the proposed summary. Attorney General Opinions on initiatives will often discuss potential interpretation or implementation issues with the initiative bill to help the lieutenant governor understand what the bill would do. In 2008, the Department of Law's opinion on 08GRTI relating to taxation of leases of gas resources pointed out multiple issues, including that "[t]he initiative is not explicit as to

[4] AS 15.45.090; AS 15.45.180.

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whom the tax is levied against;" "[t]here are serious implementation problems with this section, such as whether it is practicable to require payment of a tax without knowing until seven years later whether such liability actually existed;" and "...the term 'discovered' is not explained." Exhibit (Ex.) 1 at 3, 4.[5] Recently, on an initiative that proposed to move legislative meetings to Anchorage, the Department of Law pointed out where language was "potentially contradictory and confusing" and there "could be some potential confusion about the bill's effect." Ex. 2 at 6.[6] That opinion also highlighted the fact that the initiative bill did not conform to the legislative drafting manual. Ex. 2 at 7. And in 2007, an Attorney General Opinion on an initiative impacting mixing zones noted "the possibility that were this initiative to be enacted, it could be interpreted to provide less protection for anadromous fish with respect to the identified industry category exceptions." Ex. 3 at 3.[7]

The Attorney General Opinion on 19OGTX is no different than the myriad of other Attorney General Opinions the Department of Law has issued on initiatives. Regardless, the only thing that matters for this lawsuit is the actual language in the

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[5] 2008 Op. Alaska Att'y Gen. (Nov. 26) (http://law.alaska.gov/pdf/opinions/opinions_2008/08-013_663090038.pdf).

[6] 2019 Op. Alaska Att'y Gen. (March 26) (http://www.elections.alaska.gov/petitions/19MALA/19MALA%20-%20AG%20OPINION.pdf).

[7] 2007 Op. Alaska Att'y Gen. (Nov. 8) (http://www.elections.alaska.gov/petitions/07WIFI/07WIFI%20-%20Attorney%20General%20Opinion.pdf).

summary and whether it enables "voters to reach informed and intelligent decisions on how to cast their ballots."[8]

ii. Policy arguments regarding past changes to oil and gas tax laws are irrelevant, and the alleged unsubstantiated facts attempting to impugn the lieutenant governor must be disregarded.

Sponsors spend a significant number of pages in their Memorandum discussing the enactment of SB 21, the votes that occurred, and assertions over the "major international oil producers' political power and influence." Pl. Memo at 8-11. The place for campaigning is in the public forum. The sponsors can and have been making their arguments for why this is good policy to the voters, and any opposing groups can make their arguments. How much each side will spend on the campaign, how the law has previously been changed, and the influence that an industry may have over whether the ballot measure is ultimately successful has no place in this lawsuit. Sponsors seem to be stretching to find arguments that fit their narrative and thus are resorting to impugning an elected official in an attempt to show unsupported bias.

Sponsors attempt to link a vote on a prior piece of oil and gas legislation, SB 21, to "well-known biases" on the part of the lieutenant governor "against Alaskans receiving an increased share of the oil revenues, and against greater transparency." Pl. Memo at 11. Sponsors include a diatribe in prelude to their mention of the lieutenant governor on Alaska's vulnerability "to corruption in politics and government." Pl. Memo at 9. This discussion, included on pages 8 through 11 of sponsor's Memorandum, is inappropriate, irrelevant, and should be disregarded in its entirety.

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[8] *Planned Parenthood of Alaska v. Campbell*, 232 P.3d 725, 730 (Alaska 2010).

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In addition to being irrelevant, the Memorandum fails to mention that the production tax statutes have gone through two major amendments since SB 21.[9] Those subsequent changes restricted tax incentives put into place by SB 21 and called for increased transparency in production tax.[10] Then Senator Meyer voted for those measures as well as SB 21.[11]

We hope the Court will choose to ignore this unhelpful and misleading background, and focus on the substantive issue—is the ballot summary true and impartial?

iii. The only issue before the court is the one sentence in the ballot summary on the Public Records Act.

Sponsors use the terms "First Summary" and "Second Summary" in an attempt to avoid the legal reality—the petition summary and the ballot summary are two separate legal requirements.[12] The State fully explains this legal process and the legal duties in its Memorandum in Support of its Motion for Summary Judgment and will not reiterate those arguments here. Regardless of whether the two summaries end up being the same and whether they mirror what is proposed by the Department of Law, these are two separate legal obligations that have to be met at different points in time. And the Alaska Supreme Court has acknowledged that these requirements have two related, but distinct purposes—the petition summary "serves an important screening purpose" and

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9 Ch. 4, 4SSLA 16 (HB 247); ch. 3 SSSLA 17 (HB 111).

10 Secs. 7, 9, 18-19, & 22, ch. 4, 4SSLA 16; sec. 30, ch. 3 SSSLA 17.

11 See 2016 Senate J. 2978; 2017 Senate J. 1567.

12 AS 15.45.090; AS 15.45.180.

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the ballot summary enables "voters to reach informed and intelligent decisions on how to cast their ballots—decisions free from any partisan suasion."[13]

The summary that is now being disputed by the sponsors is the ballot summary issued on March 17, 2020. Sections A and B of sponsors' Memorandum focus on the now moot petition summary in a seeming attempt to muddy the waters and confuse the issues. The fact that the language changed between the petition summary and the ballot summary only reflects that a change occurred. Change does not equate to agreement with the sponsors positions as to bias. Moreover, if the current language in the ballot summary is true and impartial, regardless of what the petition summary said or did not say or what the alleged motivations behind writing the summary were, then the Court must uphold the summary.

Further, sponsor seems to insinuate part of the problem in this case is that the lieutenant governor did not work with the sponsor on the summary. Pl. Memo at 5-6. This again ignores the obligations (and lack of obligation) in the statutes. There is no statutory role for the sponsor in crafting the summary.[14] This does not preclude the lieutenant governor from taking suggestions from sponsors under consideration, as the lieutenant governor did here. Defendant's Memorandum in Support of Motion for Summary Judgment, Affidavit of Cori M. Mills at ¶3. But there is no legal requirement to do so, and the fact that he did not has no impact on whether the summary is legally sufficient. In fact, the Alaska Supreme Court has recognized that the statewide process

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13 *Planned Parenthood*, 232 P.3d at 729-730.

14 AS 15.45.180.

differs from the municipal process because the initiative sponsors are not responsible for the petition or ballot summary.[15] The Court has said "requiring petition summaries for initiatives [in the municipal context] to be clear and honest is necessary to guard against inadvertence by petition-signers and voters and *to discourage stealth by initiative drafters and promoters*."[16] The second factor only exists in the municipal context where initiative sponsors draft the summary.[17]

Sponsors spend very little time on the one substantive issue before the Court and instead attempt to paint a picture of some conspiracy where this initiative has been treated unfairly. Instead, the truth of the matter is that the initiative application was certified by the lieutenant governor, the sponsors gathered the requisite number of signatures, and the initiative will go on the general election ballot at the direction of the lieutenant governor. The only minor issue in dispute is whether one sentence referring to the Public Records Act fails to meet the impartiality requirements for a ballot summary.

B. A 45-page legislative bill cannot be used to interpret a two-page initiative bill.

Sponsors attach a 45-page legislative bill, SB 129, that was introduced last session and urge the Court to use this 45-page legislative bill to interpret the two-page initiative bill. Pl. Memo. at 13-14. But this ignores that courts "may not read into a

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15 *Planned Parenthood*, 232 P.3d at 732.

16 *Id.* (internal quotations and citations omitted); *see also Faipeas v. Municipality of Anchorage*, 860 P.2d 1214, 1221 (Alaska 1993).

17 *Id.*

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statute that which is not there" because "the extent to which the express language of the provision can be altered and departed from and the extent to which the infirmities can be rectified by the use of implied terms is limited by the constitutionally decreed separation of powers which prohibits courts from enacting legislation or redrafting defective statutes."[18] And when interpreting an initiative after enactment, courts "will not accord special weight to the stated intentions of any individual sponsor that are not reflected in the content of the legislation itself."[19] Similarly, when the lieutenant governor is crafting a summary to explain "the main features of the initiative's contents," he has to look to the language of the initiative bill and cannot read additional terms or explanation into the text that are not readily apparent from the language.[20]

In the case of 19OGTX, Legislative Legal Services, the entity responsible for inserting legislative bills and initiative bills into statute, has already testified that the provisions "will [most likely] get placed into statute exactly as it looks before you today."[21] This means that unless the provisions in SB 129 read identically to the

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[18] *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 192 (Alaska 2007).

[19] *Id.* at 193.

[20] *Pebble Ltd. Partnership ex rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064, 1082 (Alaska 2009).

[21] Legislative Council hearing, *Oil & Gas Initiative Hearing per AS 24.05.186*, Feb. 25, 2020, testimony of Megan Wallace, Director of Legislative Legal Services starting at 9:35.30 (http://www.akleg.gov/basis/Meeting/Detail?Meeting=SLEC%202020-02-25%2009:00:00):

> How do we put it in to our Alaska statutes? The initiative language itself does not amend any existing Alaska statutes. It has a broad general

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provisions in 19OGTX, SB 129 is irrelevant for purposes of determining what the main features of the initiative's content are and whether the summary accurately represents those features.[22] Therefore, SB 129 cannot be grafted onto the 19OGTX initiative bill and should be disregarded.

> statement and... umm... following section 1 and before section 2 that "Notwithstanding any other statutory provisions to the contrary, the oil and gas production tax in AS 43.55 shall be amended as follows." Therefore... umm... as Ms. Mills indicated the determination as to where to the place the statutes is within the purview of the revisor of statutes. Likely this provision... errr... initiative in its entirety is likely to be placed in... umm... AS 43.55, in that chapter, likely as its own article. And it will... it's my best estimation that it will get placed into statute exactly as it looks before you today... umm... I think the legislature is used or accustomed to leg legal doing a clean up or technical changes, those kind of things, and that would not occur with respect to the ballot initiative. Our revisor, as you all are aware, generally do revisor bills and do technical clean-up of things and to put it in a little bit of context, the marijuana initiative that was passed in 2014 was just cleaned up in a revisor bill last year in SB 71 in 2019. So the process for leg legal is to allow the initiative to take effect, to see it... umm... how its carried out, you know make sure to see if there's any litigation, and allow the legislature to take any action if it wants to before we do any technical clean-ups, particularly if there are any questions... umm... about the substance of the issue because the clean-ups that the revisor can do are only technical revisions that do not change the meaning of the law and so we want to be extra diligent not to make any changes that could... to... could have an impact on the implementation or the meaning of the initiative.

[22] Sponsors also assert that SB 129 would be "substantially similar." Pl. Memo at 13. This is a constitutional term of art referring to a legislative act that removes an initiative from the ballot under Alaska Const. art. XI, §4. Not only is this irrelevant to the interpretation of the initiative because "substantially similar" does not mean exactly the same, but that is a legal determination that is reached by the lieutenant governor with the formal concurrence of the attorney general once the legislation has been enacted and that has not occurred. AS 15.45.210. *See Warren v. Boucher*, 543 P.2d 731 (Alaska 1975).

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C. Despite sponsors' lengthy arguments on the petition summary, the only remaining issue on the ballot summary is the language regarding the Public Records Act, and that language presents an impartial and accurate description of the initiative bill.

When summarizing a section of the initiative that amends a statute in the Public Records Act to make certain confidential taxpayer information "a matter of public record," the ballot summary states that "the normal Public Records Act process would apply." The sponsors contend that this ballot summary statement is biased and misleading because under the normal Public Records Act process other exceptions from disclosure might apply to prevent release of some of the information. Notably, the ballot summary does not state whether any exceptions *would* apply that might preclude disclosure. The Court is to uphold ballot summary language unless it "cannot reasonably conclude that the summary is impartial and accurate."[23] Put another way the Court will uphold ballot summary language if "reasonable minds may differ."[24] This is a highly deferential standard. Sponsors cannot meet their burden to show that the ballot summary language fails under this standard as a matter of law. The ballot summary is impartial. It does not advocate for or against the change to the disclosure of taxpayer information. The ballot correctly summarizes the amendments the initiative would make to the Public Records Act and should be upheld.

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[23] *Planned Parenthood*, 232 P.3d at 729 (internal citations and quotations omitted).

[24] *Burgess v. Alaska Lieutenant Governor Terry Miller*, 654 P.2d 273, 276 n.7 (Alaska 1982) (internal citations omitted).

i. Since the confidentiality statute for tax records exists in the Public Records Act, changing the status of tax records from "confidential" to "a matter of public record" is amending the Public Records Act.

As noted by the sponsors' references to "the relevant tax statute,"[25] the initiative seeks to amend AS 40.25.100. This statute is an exclusionary statute within the Alaska Public Records Act.[26] Taxpayer information held by the Department of Revenue is excluded from public records status by this statute. In contrast, information held by other agencies is presumed to be a public record with public disclosure required on request unless the information falls into one of the exceptions to disclosure within the Public Records Act.[27] If an exception applies, unlike records that are simply confidential, the agency must notify the requestor of the reason for withholding certain information, and an appeal process applies.[28] Section 7 of the initiative would remove the exclusionary status of certain taxpayer information, meaning the Department of Revenue would no longer be required under AS 40.25.100 to hold the information confidential. Instead of being treated as confidential, the taxpayer information in Section 7 would be a matter of public record under the Alaska Public Records Act. The ballot summary accurately and impartially summarizes the initiative by informing voters that 1) the Alaska Public Records Act is being amended in the initiative and 2) that the

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25 Opposition at 22.

26 AS 40.25.295 providing that AS 40.25.100 – 40.25.295 may be cited as the Alaska Public Records Act.

27 AS 40.25.110(a) & AS 40.25.120(a) & (b).

28 2 AAC 96.335-.340.

taxpayer information identified in the initiative would be available to the public in the same manner as other public records – the normal Public Records Act process.

ii. The ballot summary does not present a form of pre-election initiative review on the legality of the proposed law; instead, the ballot summary provides voters an impartial description of what the law does.

The ballot summary describes the changes that the initiative would make to the treatment of confidential taxpayer information and the Public Records Act. The lieutenant governor is required to provide a ballot *summary*, not a verbatim restatement. Contrary to the sponsors' suggestions, all summaries involve some interpretation of what an initiative does. The ballot summary does not opine on the legality of the initiative like a pre-election review. The ballot summary statement that the "normal Public Records Act process would apply" appropriately informs voters of the changes to the treatment of taxpayer information in the initiative and the process under which the taxpayer information may be available to the public through the initiative. Sponsors suggest that the ballot summary should have been either silent as to the Public Records Act or expressly stated that it would not apply.[29]

The first suggestion would work a flaw of omission into the ballot summary. The two Alaska Supreme Court cases finding the summaries to be inaccurate or misleading were based on errors of omission. In *Planned Parenthood of Alaska v. State*, the deficiency was the omission of information relating to the criminal penalties that would

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[29] Opposition at 25.

apply for violation of the law.[30] The court found omissions "render[ed] the lieutenant governor's petition summary inaccurate in the sense that the information, were it to be included in the summary, would give petition signers 'serious grounds for reflection.'"[31] In *Alaskans for Efficient Government, Inc. v. State*, the focus was also on an omission of information that resulted in the language potentially misleading voters to think further decisions and cost information would occur in secret—instead of the requirements simply being repealed in their entirety.[32] The initiative would have moved the capitol to the Mat-Su Borough and repealed the requirements for a commission that would look at costs and then send a bond package to the voters to approve.[33] The Court changed the language to better reflect the repeal of the statute.[34] If the lieutenant governor in this case had left out information on the amendment to the Public Records Act, another party could have challenged the summary on similar grounds of omission.

It is imminently reasonable that the lieutenant governor's ballot summary informs voters that the initiative is amending a statute in the Alaska Public Records Act. This is particularly the case when the text of the initiative uses "notwithstanding" clauses that obscure the scope of the changes to existing law from the voters. Due to the importance of clarity in such matters, in the recent past when the legislature has provided for greater transparency of certain tax information it has amended both AS 43.05.230 with specific language for disclosures and AS 40.25.100(a) with

30 232 P.3d at 730.

31 *Id.*

32 52 P.3d 732, 736 (2002).

33 *Id.*

34 *Id.*

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express cross-references.[35] Indeed, sections 1 and 2 of SB 129 follow a similar structure. SB 129 cannot be drafted into an interpretation of the initiative as noted earlier, but if it could, it would not support the sponsors' suggested interpretation because it uses different and more limiting terms. SB 129 only contemplates information "on a return" being "public information" as opposed to "all filings and supporting information" being "a matter of public record" set out in the initiative.

The sponsors' second suggestion—that the summary should state the Public Records Act does *not* apply—is inaccurate. The sponsors seem to disagree with the Attorney General Opinion reviewing the initiative application as to whether any of the exceptions for public records disclosures could apply to the taxpayer information in Section 7 of the initiative.[36] The sponsors argue "[i]f a document is 'a matter of public record,' the document is available to the public and not confidential." Pl. Memo. at 22. The sponsors' citations for this argument do not even mention how those public records would be treated under the Public Records Act. The sponsors also ignore the fact that when the legislature has mandated that taxpayer information be public outside of the public records process, it expressly stated how the information is to be disclosed.[37] Additionally, the sponsors seem to ignore the existence of AS 40.25.120(a), providing exceptions to public record disclosures. Even if the initiative could be construed as to

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35 See, AS 40.25.100(a)("except as provided in AS 43.05.230(i) – (*l*)") & AS 43.05.230(i) –(*l*)(providing express allowances for disclosures of certain tax information).

36 AS 40.25.120(a).

37 AS 43.05.230(*l*)(mandating the Department of Revenue make its purchase of certain tax credit certificates "public by April 30 of each year.").

somehow modify some exceptions in AS 40.25.120(a), the initiative does not modify the process of how the taxpayer information would be requested and disclosed. The initiative does not create a new public records act. Accordingly, the ballot summary language that the normal Public Records Act process would apply is impartial and accurate.

iii. For purposes of the ballot summary, analysis in the Attorney General's Opinion of potential legal issues with 19OGTX is irrelevant; the ballot summary, on its face, does not draw any conclusions about what may ultimately be disclosed under the Public Records Act.

The ballot summary language is the language that will be before the voters. This is the language that is required to be accurate and impartial. As discussed above, the sponsors attempt to show bias based on unsubstantiated claims about the lieutenant governor and disagreements with statements from the Attorney General Opinion. The sponsors' views about other actions and other documents cannot work a bias in the plain language of the ballot summary. The lieutenant governor is required to create a ballot summary that accurately and impartially describes the proposed law, not what the sponsors wish the proposed law said or how the sponsors wish the proposed law would be applied in future. The sponsors may *wish* the initiative bill to be implemented in a specific way, but neither the court nor the lieutenant governor may "read into a statute [or initiative bill] that which is not there."[38] The ballot summary statement that the Public Records Act would apply is reasonable and must be upheld.

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38 *Alaskans for a Common Language, Inc.*, 170 P.3d at 192.

III. CONCLUSION

The Court should ignore sponsors' superfluous and goading arguments making up the majority of its brief. Instead, the Court simply looks to the language at issue in the summary: "This means the normal Public Records Act would apply." This short, understandable sentence gives the voters information on how the initiative bill would change existing law and what process would apply, since the statute in the Public Records Act making the records confidential would implicitly be amended. Ultimately, exactly what would be disclosed by the Department of Revenue under a public records request for tax records if the law were enacted is unknown and would have to be determined based on the request and the specific tax filings at issue—just like any other public record. For now, the ballot summary provides the voters with the pertinent information needed on the main features of the initiative bill to decide how they want to vote. The lieutenant governor has fulfilled his statutory obligation, and summary judgment should be granted in favor of the State.

DATED May 15, 2020

KEVIN G. CLARKSON
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November 26, 2008

The Honorable Sean R. Parnell
Lieutenant Governor
P.O. Box 110015
Juneau, Alaska 99811-0015

Re: Review of Initiative Application on
Taxation of Leases of Gas Resources (08GRTI)
A.G.O. file no. 663-09-0038

Dear Lieutenant Governor Parnell:

You have asked us to review an application for an initiative petition entitled "An Act levying a tax on certain gas reserves; providing for a conditional repeal of the tax on certain gas reserves; relating to a credit against the oil and gas production tax attributable to the production of gas; relating to expenses that are not lease expenditures for the purpose of the oil and gas production; and providing for an effective date." We have completed our review and find that the application complies with the constitutional and statutory provisions governing the use of the initiative, and therefore recommend that you certify the application.

I. SUMMARY OF THE PROPOSED BILL AND ANALYSIS

A. BRIEF SUMMARY AND BACKGROUND

The provisions of this initiative are aimed at encouraging development of large deposits of gas reserves. The initiative would tax some confirmed below-ground reserves of natural gas unless the producers committed to sell the gas through a yet-to-be-built pipeline to North American markets, such as the "AGIA" pipeline, or a similar pipeline. One commentator has indicated that "the proposed measure is an effort to force the three companies that hold most of the gas that would be taxed to commit the product for sale through one of two pipeline construction projects."[1]

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[1] *See State Tax News and Analysis*, "Lawmakers File Petition to Tax Natural Gas Reserves," (Bob Tkacz, Juneau, Oct. 6, 2008).

This initiative petition is similar to an initiative petition submitted in 2005, "05GAS2," which appeared on the 2006 General Election ballot ("2006 initiative"). Some of the same prime sponsors of 05GAS2 are also members of the initiative committee for the current initiative.[2] We reviewed the earlier initiative application and recommended that you certify that application in 2005 Inf. Op. Att'y Gen. (Aug. 29, 2005).[3] Also in 2005, we reviewed and recommended certification of a similar predecessor initiative, "05GAST," in 2005 Inf. Op. Att'y Gen. (Aug. 1; 663-05-0213).[4] For background, we refer you to these earlier review memoranda.

B. SECTIONAL SUMMARY

The bill proposed by this initiative application is seven pages long, and is divided into ten sections. Section 1 sets out the short title of the bill. Section 2 creates the new tax with the addition of new sections to Title 43, Revenue and Taxation, AS 43.58.210 – AS 43.58.900. Section 3 adds a new section, AS 43.55.027, to the oil and gas production tax statute. Section 4 amends AS 42.55.165, lease expenditures. Sections 5 and 6 are contingent repealing clauses. Section 7 adds an "escrow provision" to the uncodified law. Section 8 adds a new section to the uncodified law authorizing lessee surrender of leases. Section 9 adds a severability clause to the uncodified law. Section 10 adds "notice of date of first flow of gas" to the uncodified law.

The bill is summarized in more detail below, with some highlights of potential problems that may arise in implementing certain provisions of the bill.[5]

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[2] Current initiative sponsors Representatives Harry Crawford and David Guttenberg also sponsored 05GAS2 and 05GAST.

[3] The prior initiative, 05GAS2, appeared on the November 7, 2006, general election ballot, and failed to pass by a vote of 80,909 in favor and 152,889 against.

[4] After you certified this application, the sponsors withdrew their application for 05GAST.

[5] Staff from the Oil, Gas and Mining section of our office provided assistance in preparing this review, including the summary of the bill to be enacted, the sectional summary, and the proposed ballot summary for the bill.

Section 1.

Short title, "Alaska Gasline Now! Act."

Section 2.

AS 43.58.210. Levies an annual tax of three cents per thousand cubic feet of natural gas on "taxable gas." The initiative is not explicit as to whom the tax is levied against, however it appears from other provisions of the bill that the drafters intended to make "the person holding the right to produce gas from the lease or property" liable to pay the new tax.[6] (*See e.g.*, proposed AS 43.58.220(b)(6)).

AS 43.58.220(a). Taxable gas is gas that, on January 1 of the tax year, is within a lease or property that is within a unit that contains one trillion cubic feet (TCF) of gas or more, and is within a lease or property that has been in continual existence since January 1, 1990. This section raises several questions, including whether taxable gas is limited to recoverable gas or gas that is recoverable but marginally economic, and the application of the tax to a joint state/OCS unit.

AS 43.58.220(b). Describes gas that is not subject to the new tax:

(b)(1) – Nonconventional gas;

(b)(2) – Gas that does not contain hydrocarbons (e.g., carbon dioxide);

(b)(3) – Gas that, within seven years after January 1 of the tax year, will be consumed as fuel in the unit in which it is located, or is gas liquids to be blended with oil and shipped to market in the oil pipeline. There are serious implementation problems with this section, such as whether it is practicable to require payment of a tax without knowing until seven years later whether such liability actually existed;

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[6] The 2006 initiative specified that the new tax applied to "leases having taxable gas" and that the tax was to be paid by the lessee. The current initiative, however, does not specify who pays. This ambiguity might cause problems for DOR because lessees could argue that they owe no tax because they do not own the reserves. The question of ownership of reserves has not been addressed by the Alaska courts, but, a number of other states consider an oil and gas lease to be in the nature of a "profit a prendre," which allows the lessee to extract oil and gas from the property but does not constitute present ownership of resources in the ground. If the lessees do not own the gas, presumably the owner is the lessor, which in most cases is the State of Alaska. The initiative proponents clearly did not contemplate the state taxing itself.

(b)(4) – The state's royalty share of gas;

(b)(5) – Gas that was first discovered after December 31, 2005. The Department of Revenue (DOR) may have difficulty implementing this section because the term "discovered" is not explained. For example, if a gas-containing pool was discovered before 2005, but its extent was not delineated until after 2005,[7] is all of the gas in the pool considered to have been discovered before 2005, or only that portion thought to exist based on the initial discovery;

(b)(6) – Gas that is within a North Slope lease or property and the gas producer (or a person who has purchased gas to be produced) demonstrates to the commissioner's satisfaction that the person has committed to acquiring firm transportation capacity in a binding open season on (A) a pipeline project authorized under an Alaska Gasline Inducement Act (AGIA) license; (B) a pipeline from the North Slope to market that is developed by a person that has made the same commitments as those required by AGIA, (this provision raises a potential conflict with AGIA licensee project assurances under AS 43.90.440); or (C) a pipeline designed to accommodate throughput of no more than five hundred million cubic feet a day. This subsection is the cornerstone of the initiative, and sets out the goal of the measure, which is to get gas flowing to market through a major pipeline.

AS 43.58.220(c). Establishes the volume of gas exempt from the tax under subsection (b)(6).

AS 43.58.220(d). Definitions for this section ("nonconventional gas," "North Slope," "open season," and "right to produce gas").

AS 43.58.230(a). Establishes that DOR shall determine the volume of taxable gas on the date the Act becomes effective "after consultation" with the Department of Natural Resources (DNR) and the Alaska Oil and Gas Conservation Commission (AOGCC). In making this determination, DOR is supposed to rely on the estimate of gas reserves in the DNR Division of Oil and Gas 2006 Annual Report, "absent clear and convincing evidence to the contrary." DOR does not know what "after consultation" means. For example, if DOR rejects DNR and the AOGCC's advice, is there is an argument that DOR's determination is an abuse of discretion? Further, the first sentence in the section

[7] A field may be discovered, and it's extent unknown, until engineering and drilling of exploratory wells delineating the extent of the field. This section sets up a tension between the producers and the taxing authority where the producers will want to claim a greater amount of gas was discovered after December 1, 2005, and the taxing authority will claim that more of the gas was discovered before this date.

allows DOR to make the determination and requires only consultation with DNR and the AOGCC, but the last sentence requires DOR to rely on DNR's 2006 Annual Report. It is not clear why DOR must rely on the 2006 report, rather than on DNR's most up-to-date annual report. In addition, the last sentence in the section appears incomplete. The sentence provides that DOR is to rely upon the annual report "absent clear and convincing evidence to the contrary." DOR does not know whether "to the contrary" refers to the accuracy of the 2006 report itself or to the applicability of the 2006 report if, for example, new reserve estimates have made the 2006 report outdated.

AS 43.58.230(b). For a unit where each person with an interest in a lease or property in that unit has agreed to a formula(s) for the allocation of hydrocarbons, DOR is directed to use that formula(s) in allocating taxable gas among each holder of interest for the purpose of assessing and collecting the new tax. DOR may have problems implementing this provision if the lessees have agreed to different formulas for allocation of oil and gas.

AS 43.48.230(c). Establishes the allocation of taxable gas for a unit in which all persons having an interest in the lease or property have not agreed to a formula for the allocation of hydrocarbons. In that case, DOR may allocate taxable gas in any manner it considers reasonable. This includes a means of allocation that takes into consideration one or more of:

> (1) An agreement between the department and all persons holding an interest in leases or properties in the unit regarding the allocation of taxable gas;
> (2) The amount of gas initially determined within a lease or property and the amount of gas remaining;
> (3) The amount of recoverable gas reserves or resources within the lease or property; or
> (4) The surface acreage of the lease or property.

AS 43.58.230(d). Allows DOR to delegate to DNR and AOGCC the authority to determine the allocation of taxable gas under subsection (c) in order "[t]o facilitate the use of confidential information available" to the two agencies. If there is a protest of an allocation decision, DNR and AOGCC are required to assist DOR in determining the proper allocation for tax purposes. This appears to give DOR the authority to order DNR and AOGCC to assist DOR; but it is not clear what form of assistance DNR and the AOGCC must provide.

AS 43.58.240. Sets out the process for filing taxpayer returns and payment of the tax. These tax returns are not like residential real property taxes, where the government

sends the taxpayer an assessment in advance of payment of the tax. Instead, the tax is more like federal personal income taxes, where the taxpayer calculates the tax to be paid, pays the tax to the government, and may be audited and assessed additional taxes due or to be refunded. For these gas reserves taxes, the taxpayer will file a return, DOR will review the return, DOR may conduct an audit, and the audit can trigger an assessment. AS 42.58.240 includes the following subsections:

(a) Requires a return setting out the location and volume of taxable gas existing on January 1 of the tax year. However, the section does not notify the taxpayer of the level of detail required in a tax return. For example, does the return need to be backed up by a petroleum engineer's report or can the lessee simply state its best guess of the location and volume of gas? The DOR hopes it can clarify this requirement in the regulations adopted to implement this section.

(b) With the written approval of DOR, a unit operator may submit returns or pay the tax on behalf of each person with an interest in the unit.

(c) The annual tax is payable to DOR on or before June 30 of each year or in installments at the times and under the condition that DOR may establish by regulation.

(d) Under the direction of or with the approval of DOR, a person may file a single return for all of the person's leases or properties within a unit and may pay the tax in a single payment.

(e) DOR may, by written notice, require a person filing a return to submit additional information "relating to the assessment of the tax" within 30 days after providing notice to the person. As explained above, there is no assessment when a return is filed. Assessments are issued by DOR if DOR audits a taxpayer and finds additional taxes or a refund is owed. Therefore, DOR is not certain what this subsection means, and interprets it to apply to the audit phase of the taxation process.

AS 43.58.250. Directs DOR to adopt regulations relating to making and filing returns and paying the tax and that are otherwise necessary for enforcement of the initiative. Through the regulations, DOR is required to address:

(1) The annual preparation of the tax roll of property that includes each lease or property with taxable gas. However, DOR does not prepare "tax rolls" for this type of tax. This tax is not a property tax where a tax roll would ordinarily be part of the taxation process. Therefore, DOR does not understand the use of the term "tax roll" in

this section. If this section means that DOR is supposed to prepare a list of taxpayers who file returns, DOR can do that.

(2) The means for providing notice to operators and persons having an interest in a lease or property having taxable gas of the volume of taxable gas for each lease or property. DOR does not understand what this notice is supposed to include. Producers are supposed to self-identify the volume of taxable gas in their tax returns. (*See e.g.*, proposed 43.58.240(a)). Subsection (2) apparently requires DOR to also identify the volume of taxable gas, while not explaining how the producers would use this information.

(3) The procedure by which a person aggrieved by an action of the department may appeal that action and obtain a hearing. This initiative imposes a number of duties on DOR, including the duty to determine whether a person has made firm commitments to transport gas on a pipeline (*see e.g.*, proposed AS 43.58.220(b)(6)) and the duty to determine the amount of taxable gas in each state-approved oil and gas unit (AS 43.58.230(a)). It appears that the sponsors intend those determinations, in the absence of an assessment, to be appealable. Although DOR already has a number of detailed appeal procedures relating to assessments, these regulations propose an additional appeal procedure specific to DOR's determinations that are not assessments. These proposed regulations would be in addition to existing regulations, 15 AAC 05.001 – 15 AAC 05.050, which already set out DOR's appeal and hearing procedures for appeals of tax assessments under AS 43 (other than property tax assessments under AS 43.56), and AS 43.05.240, AS 43.05.241, and AS 43.05.405 – AS 43.05.499, which already establish appeal and hearing procedures for challenges to DOR's actions "fixing the amount of a tax."

(4) Preparation of the final taxation roll and a supplemental tax roll to be certified using the procedures applicable to the preparation of the original tax roll. As explained above, DOR does not use tax rolls for these types of taxes. Therefore, DOR has the same questions here as in relation to subsection (1) above, with the additional question of what is meant by a "supplemental tax roll."

AS 43.58.900. Definitions.

Section 3.

AS 43.55.027. Adds a new section to the oil and gas production tax that authorizes an annual tax credit against 20 percent of a producer's oil or gas severance taxes until the producer recovers the full amount of any reserve taxes paid. The credit is available "after

the date the first flow of gas in a pipeline transporting North Slope gas to market with a minimum delivery capacity of 2,000,000,000 cubic feet a day generates revenue to its owners." The credit may be claimed "only against 20 percent of the net amount of tax due under this chapter." The net amount of tax due is determined after the application of all credits applicable under the production tax, other that the credit authorized by this section.

The DOR has questions about whether the credit is intended to be available only against the production tax on gas that was subject to the reserves tax before it was produced, or against the total production tax for oil and gas produced by a producer whose production includes any amount of gas that was subject to the reserves tax before it was produced. DOR is also uncertain on how to determine the amount of the tax if the credit is limited to the production tax on gas, or on same gas (i.e., gas subject to the reserves tax) because the production tax is generally not calculated separately for oil and gas, except for Cook Inlet production and gas used in the state that is subject to the tax ceiling under AS 43.55.011(o).[8]

DOR interprets "first flow of gas in a pipeline," set out in proposed AS 43.55.027(b), as the first flow of any producer's gas, not the first flow of the gas generated by the producer requesting the tax credit. In relation to the phrase "generates revenue to its owners," DOR has questions on how it will determine that revenue is being "generated," and whether "owners" refers to the owners of the pipeline or the owners of the gas.

Section 4.

AS 43.55.165(e)(14). The initiative amends the list of lease expenditures that a producer is not allowed to deduct from production taxes owed, to include the gas reserves tax paid under the initiative. The effect of this amendment is that a taxpayer may not deduct the reserves tax paid under the initiative from production taxes owed. In addition to imposition of the new gas reserves tax, this section making the reserves tax non-deductable, is another incentive to producers to develop the large gas reserves.

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[8] Alaska Statute 43.55.011(o), on the oil and gas production tax, provides:

> Notwithstanding other provisions of this section, for a calendar year before 2022, the tax levied under (e) of this section for each 1,000 cubic feet of gas for gas produced from a lease property outside the Cook Inlet sedimentary basin and used in the state may not exceed the amount of tax for each 1,000 cubic feet of gas that is determined under (j)(2) of this section.

Section 5.

This section repeals the reserves tax created by this initiative "on the date on which the first flow of gas in a pipeline transporting North Slope gas to market with a minimum delivery capacity of 2,000,000,000 billion cubic feet a day generates revenue to its owners." DOR has the same questions on how to implement the section as previously discussed under AS 43.58.210 and AS 43.55.027, above. That is, how does DOR determine who are the "owners" referenced, and how will DOR determine that revenues are being generated? We assume that the repeal is not retroactive. If, for example, where a taxpayer did not make a commitment to a gas pipeline or did not consume the gas on site, and the gas held by another producer starts "flowing" in 2020, the first taxpayer still owes tax for 2012.

This section identifies an effective date (i.e., the date that there is the first flow of gas). However, to the extent that the initiative identifies an effective date, it cannot be sooner than the effective date set out in the Alaska Constitution.[9]

Section 6.

Repeals the changes made to AS 43.55.165(e)(14) under this Act when the contingency described in Section 5 of this Act occurs (first flow of gas in major pipeline).

Section 7.

Adds an "escrow" provision to the un-codified law. Under this provision, a taxpayer is required to place into an escrow account the amount of disputed taxes levied under AS 43.58. The escrow account will be in a financial institution approved by DOR. The provision provides that, "[u]pon final resolution of the dispute, the amount in escrow, if any, owing to the department, together with culminated interest, shall be paid to the department and may be appropriated for any legal purpose."

There appears to be a typographical error in the last sentence of the provision – "culminated interest" should probably be "cumulated interest."

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[9] *See* Alaska Const. art. XI, § 6 ("[a]n initiated law becomes effective ninety days after certification").

Section 8.

Provided certain conditions are met, this section authorizes a lessee to surrender a lease to DNR to avoid the tax liability created by the Act.

Section 9.

Severability clause.

Section 10.

Adds a new section to the uncodified law directing the DNR commissioner, as soon as practicable after the first flow of gas described in Section 5, to certify to the DOR commissioner and the reviser of statutes the date on which the first flow of gas occurs.

C. ANALYSIS

Under AS 15.45.070, within 60 calendar days after the date the application is received, the lieutenant governor is required to review an application for a proposed initiative and either "certify it or notify the initiative committee of the grounds for denial." From your transmittal documents we understand that you received the completed application on September 30, 2008. Therefore, your certification decision is due on December 1, 2008.[10] The grounds for denial of an application are that (1) the proposed bill is not in the required form; (2) the application is not substantially in the required form; or (3) there is an insufficient number of qualified sponsors. AS 15.45.080.

1. The Form of the Application

The form of an initiative application is prescribed in AS 15.45.030, which provides:

> The application must include the (1) the proposed bill, (2) printed name, the signature, the address, and a numerical identifier of not fewer than 100 qualified voters who will serve as sponsors; each signature page must include a statement that the sponsors are qualified voters who signed the application with the proposed bill attached, and (3) designation of an initiative committee consisting of

[10] *See* October 1, 2008 memorandum from Lieutenant Governor Sean Parnell to Attorney General Talis Colberg, re: gas reserves tax initiative and amended receipt date.

> three of the sponsors who subscribed to the application and represent all sponsors and subscribers in matters relating to the initiative; the designation must include the name, mailing address, and signature of each committee member.

The application meets the first and third requirements. With respect to the second requirement, the Division of Elections within your office determines whether the application contains the signatures and addresses of not less than 100 qualified voters.

2. The Form of the Proposed Bill

The form of a proposed initiative bill is prescribed by AS 15.45.040, which requires that (1) the bill be confined to one subject; (2) the subject be expressed in the title; (3) the enacting clause state, "Be it enacted by the People of the State of Alaska"; and (4) the bill not include prohibited subjects. The prohibited subjects--dedication of revenue, appropriations, the creation of courts or the definition of their jurisdiction, rules of court, and local or special legislation--are listed in AS 15.45.010 and in article XI, section 7 of the Alaska Constitution.[11]

The form of the bill to be enacted by this initiative satisfies the requirements of AS 15.45.040.[12] The bill is confined to a single subject, taxation of gas resources. The subject of the bill is expressed in the title of the bill, and the bill contains the required enacting clause language. Given the requirement that the "usual rule is to construe voter initiatives broadly so as to preserve them whenever possible," we conclude that the bill does not appear to clearly address a subject prohibited from initiative by the Alaska

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[11] Constitutional amendments are also a prohibited subject. *State v. Lewis,* 559 P.2d 630, 639 (Alaska 1977); *Starr v. Hagglund*, 374 P.2d 316, 317 n.2 (Alaska 1962).

[12] We also note that our office has advised the lieutenant governor in the past that there is no explicit prohibition on certification of initiative applications relating to taxation. *See* 1985 Inf. Op. Att'y Gen. (May 10; 663-85-401); 1992 Inf. Op. Att'y Gen. (Apr.2; 663-92-0447); 1994 Inf. Op. Att'y Gen. (Jul. 14; 663-94-0667); 1999 Inf. Op. Att'y Gen. (May 25; 663-99-0214); 1999 Inf. Op. Att'y Gen. (Jul. 6; 663-99-0260); 2001 Inf. Op. Att'y Gen. (May 2; (663-01-0156); 2003 Inf. Op. Att'y Gen. (Oct. 6; 663-03-0179). This initiative does not designate the use of state assets in a manner that is executable, mandatory, and reasonably definite, with no further legislative action, and therefore does not amount to an appropriation. *See McAlpine v. Univ. of Alaska,* 762 P.2d 81, 91 (Alaska 1988).

Constitution.[13] As noted in our earlier review memoranda, in the pre-election review of an initiative it is appropriate to consider the issue of whether the initiative proposes a prohibited subject under the Alaska Constitution, art. XI, sec. 7. [14]

The escrow provisions set out in section 7 in the current bill raises issues regarding the prohibited subjects of dedication of revenue, making an appropriation, and prescribing a court rule.[15] The initiative also implicates the constitutional budget reserve (CBR) provision of the Alaska Constitution.[16] These same questions were raised by the earlier gas tax initiatives, and addressed in our earlier review memorandum.[17] We summarize our previous advice on these questions as follows.

Our principle concern is that the escrow account authorized by section 7 would constitute a dedicated fund. The escrow provision set out at section 7 is identical to the

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[13] *See Pullen v. Ulmer*, 923 P.2d 54, 58 (Alaska 1996); *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1181 (Alaska 1985).

[14] *See Trust the People v. State*, 113 P.3d 613, 625-26 (Alaska 2005) (pre-election judicial review may extend only to subject matter restrictions that arise from a provision of Alaska law that expressly addresses and restricts Alaska's constitutionally-established initiative process); *Alaska Action Center, Inc. v. Municipality of Anchorage*, 84 P.3d 989, 993 (Alaska 2004) (proscriptions of article XI, section 7 of the Alaska Constitution are subject matter restrictions that provide grounds for pre-election review); *Brooks v. Wright*, 971 P.2d 1025, 1027 (Alaska 1999) (pre-election review is limited to ascertaining whether the initiative complies with the particular constitutional and statutory provisions regulating initiatives).

[15] The prohibition on initiatives for appropriations, dedicated funds, or court rules is set out in the Alaska Constitution, art. XI, sec. 7: "The initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts... or prescribe their rules...." The prohibition on dedicated funds is set out in the Alaska Constitution, art. IX, sec. 7: "The proceeds of any state tax or license shall not be dedicated to any special purpose."

[16] *See* Alaska Const. art. IX, § 17. Under this provision, "all money received by the State... as a result of the termination... of an administrative proceeding or of litigation... involving taxes imposed on mineral income, production, or property, shall be deposited in the budget reserve fund."

[17] *See* 2005 Inf. Op. Att'y Gen., pp. 5-10 (Aug. 29; 663-06-0014).

escrow clause set out at section 5 of the 2006 initiative, except that it does not include the last few words "including construction of a state-owned-natural gas pipeline." This difference is not material for purposes of analyzing whether the current bill includes prohibited subjects. The escrow account can be viewed as having attributes of a dedicated fund because it reserves money for a specific purpose and segregates a potentially substantial amount of tax revenue from all other funds of the state. Disputes over taxes could last a long time, and during this time the money in escrow would be unavailable for use of other state purposes, outside the state's general fund and out of reach of the legislature. On the other hand, one can argue that the funds in the escrow account have not yet become the proceeds of a tax levy until after a determination is made on disputed taxes. Following a determination that the taxes are owed to the state, the money in the account would become state money available to the legislature for any state purpose.[18] There are arguments on both sides of this point, and we cannot say for certain that the escrow clause creates a dedicated fund. Therefore, we find that while the escrow clause may violate the dedicated fund prohibition, that conclusion is not so clear that we can recommend that you deny certification of this initiative application.

The escrow account is not an appropriation because it does not designate the use of state assets in a manner that is executable, mandatory, and reasonably definite with no further legislative action.[19] The account is a depository for disputed taxes pending resolution of the dispute. If the dispute is decided in the state's favor, the money becomes state revenue available for appropriation at that time. If the dispute is decided in the taxpayer's favor, the money would have to be refunded to the taxpayer even if it had

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[18] At first reading, the language of the escrow provision may seem to conflict with the requirement of the art. IX, sec. 17 of the Alaska Constitution, on the constitutional budget reserve fund, because it directs escrow funds to be paid to the Department of Revenue and provides that they may be appropriated "for any legal purpose." However, it is possible to reconcile this language with the constitutional CBR requirement. The DOR generally has the responsibility to collect and manage state funds and revenues, including revenues to be deposited in the CBR, *see* AS 37.10.430, AS 44.25.020(2), so the initiative's directive to pay escrow funds to the DOR should be interpreted as incorporating an implied directive for the DOR to deposit those funds in the CBR in accordance with art. IX, sec. 17. Similarly, the initiative's reference to appropriations for any legal purpose should be interpreted as providing for appropriation in accordance with the restrictions of art. IX, sec. 17, which include the three-fourths vote requirement. Therefore, we do not believe that the initiative violates the budget reserve fund provision of the Constitution.

[19] *See McAlpine v. Univ. of Alaska*, 762 P.2d 81, 91 (Alaska 1988).

initially been deposited in the general fund. Such refunds do not require an appropriation.[20]

Although the escrow provision would require a court to place disputed funds in an escrow account, this does not make the provision a court rule. The escrow provision does not conflict with an existing court rule, and establishment of an escrow account for disputed tax payments is not a matter of traditional judicial regulation.[21]

In another earlier opinion[22] we also earlier analyzed whether this type of initiative would constitute "local or special legislation," a prohibited subject for the initiative under the Alaska Constitution, art. XI, sec. 7.[23] Therefore, we also incorporate by reference our analysis of that point set out in our earlier opinion. As set out in that earlier review, we find that the bill proposed by the initiative does not appear to be local or special legislation because it is fairly and substantially related to legitimate state purposes.[24] The sponsors have indicated that the purpose of the bill is to encourage development of gas resources for the benefit of the people, addressing a matter of statewide concern.

There is also an issue with the title and effective date of the bill. While the title says the Act provided for an effective date, the initiative does not contain a specific effective date provision. The lack of an effective date is not a flaw in the initiative (though the title should be fixed). Under the Alaska Constitution, Article XI, section 6, an initiative that is passed by the voters becomes effective 90 days after the date that the lieutenant governor certifies the election returns approving the initiative.[25]

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20 AS 43.10.210 provides the DOR with authority to refund taxes if the taxpayer makes an overpayment.

21 The Alaska Rules of Court, Civil Rule 67 on deposits in court does not operate as an escrow account, and the escrow provision in this initiative establishes a separate and distinct procedure from this court rule.

22 *See* 2005 Inf. Op. Att'y Gen. at 7-8 (Aug. 1; 663-05-0213).

23 *See* Alaska Const. art. XI, § 7 ("[t]he initiative shall not be used to... enact local or special legislation").

24 *See Baxley v. State,* 958 P.2d 422, 430 (Alaska 1998).

25 *See also* AS 15.45.220.

There is another issue under existing AS 43.55.017(a), which provides that the state may not impose a tax on producing oil or gas leases.[26] Consequently, there is a question whether a reserves tax on gas in producing fields constitutes a tax on a producing oil or gas lease in contravention of AS 43.55.017(a). To the extent of any such inconsistency with AS 43.55.017(a), however, the initiative would probably be construed as an exception to the general limitation in AS 43.55.017(a).[27]

As you know, the lieutenant governor is obligated to ensure that a proposed initiative does not violate the restrictions of article XI, section 7 of the Alaska Constitution; however, the "usual rule is to construe voter initiatives broadly so as to preserve them whenever possible."[28] We have also considered the admonition set out in *Citizens Coalition v. McAlpine*, 810 P.2d 162, 168 (Alaska 1991) to "interpret all constitutional provisions—grants of power and restrictions on power alike—as broadly as the people intended them to be interpreted." Based on our pre-election review of this initiative with respect to article XI, section 7, of the Alaska Constitution, and the various cases interpreting use of the initiative in Alaska, discussed above and in footnotes, we do not find that the bill to be initiated here includes a prohibited subject. We have noted numerous ambiguities in the measure proposed by the initiative in this opinion; however potential problems in implementing the measure are not a bar to your certification of the initiative application.

In general, a legal review of constitutional or other legal infirmities would occur when and if the bill is passed by the voters and challenged in court.[29] However, the lieutenant governor does have the highly circumscribed "power to refuse to give life to

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[26] AS 43.55.017 provides that the taxes imposed by the chapter of state law on the oil and gas production tax are in place of all other taxes that may be imposed on producing oil or gas leases, on oil or gas produced or extracted in the state, and on the value of intangible drilling and development costs.

[27] *See Pena v. State*, 664 P.2d 169, 175 (Alaska App. 1983) (where possible, conflicting statutes will be harmonized).

[28] *See, e.g., Pullen v. Ulmer*, 923 P.2d 54, 58 (Alaska 1996); *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1181 (Alaska 1985).

[29] *See Trust the People*, 113 P.3d at 625-26; *Brooks v. Wright*, 971 P.2d 1025, 1027 (Alaska 1999).

proposals or laws that are clearly unconstitutional."[30] As we have explained above, although there are many ambiguities and legal issues presented in the initiative measure, we do not find that the initiative measure is clearly unconstitutional.

II. PROPOSED BALLOT AND PETITION SUMMARY

We have prepared a ballot-ready petition summary and title for your consideration. We have worked with staff from the oil, gas and mining section of our office to prepare this summary. It is our practice to provide you with a proposed title and summary to assist you in complying with AS 15.45.090(2) and AS 15.45.180. Under AS 15.45.180, the title of an initiative is limited to 25 words, and the body of the summary is limited to the number of sections in the proposed law multiplied by 50. Here there are 10 sections, so the maximum number of words for the summary is 500. We have used 244 words in the summary below. We propose that the same title and summary be used on the petition and on the ballot in order to reduce the chance of collateral attack due to a divergence between the ballot and petition summaries. We propose the following summary for your review:

Taxation of Gas Reserves

> This initiative would impose a new state tax on large deposits of natural gas until the first flow of gas in a major new gas pipeline system. The tax would be three cents a year per thousand cubic feet of taxable gas in the ground. "Taxable gas" is gas within a lease or property in a unit that contains one trillion cubic feet of gas or more. The gas is taxable if the lease or property has been in existence since January 1, 1990. Some forms of gas are exempt from the tax. Gas that will be consumed as fuel where it is located, within seven years after January 1 of the tax year is exempt. Gas first discovered after December 31, 2005, is exempt. Gas on the North Slope belonging to a person who has committed to shipping the gas under an AGIA or similar pipeline project or in a small pipeline is also exempt. State agencies would set the taxable volume of gas. Taxpayers would have to file returns showing the location and volume of taxable gas. The state would adopt rules on tax returns and payment. Taxpayers who dispute taxes owed would have to deposit the amount of taxes levied into an escrow account. A lessee may surrender a lease to the state to avoid taxes under

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[30] *See Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 900 (Alaska 2003); *Alaska Action Center, Inc., v. Municipality of Anchorage*, 84 P.3d 989, 992-93 (Alaska 2004); *Trust the People*, 113 P.3d at 625 n.50.

this Act. If and when taxable gas is produced and transported in a major gas pipeline system, the gas tax would be repealed.

Should this initiative become law?

This summary has a Flesch test score of 56.6, which is close to the target readability score of 60 set out in AS 15.60.005. We have tried to use simple words to summarize the complicated subject matter of this initiative in order to ensure that the summary meets the readability standards of AS 15.60.005.

III. CONCLUSION

For the reasons set out above, we find that the proposed bill and application are in the proper form, and that the application complies with the constitutional and statutory provisions governing the use of the initiative. Therefore, we recommend that you certify this initiative application, and so notify the initiative committee. Preparation of the petitions may then commence in accordance with AS 15.45.090.

Please contact me if we can be of further assistance to you on this matter.

Sincerely,

TALIS J. COLBERG
ATTORNEY GENERAL

By:

Sarah J. Felix
Assistant Attorney General
Alaska Bar No. 8111091

cc: Gail Fenumiai, Director
Division of Elections

Tina Kobayashi, Chief Assistant Attorney General
Lisa Weissler, Assistant Attorney General
Oil, Gas, and Mining Section, Juneau

SJF:rnl

THE STATE
of ALASKA
GOVERNOR MICHAEL J. DUNLEAVY

Department of Law
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March 26, 2019

The Honorable Kevin Meyer
Lieutenant Governor
P.O. Box 110015
Juneau, Alaska 99811-0015

Re: *19MALA Ballot Measure Applications Review*
AGO No. 2019200204

Dear Lieutenant Governor Meyer:

You asked us to review an application for an initiative bill titled "An initiative requiring meetings of the Alaska Legislature to be held in Anchorage" (19MALA). Because the application complies with the constitutional and statutory provisions governing the initiative process, we recommend that you certify the application.

I. The proposed initiative bill.

19MALA would require that all legislative meetings be held in Anchorage. The bill would also exempt this relocation of legislative meetings from the current statutory mandates that require a statewide election and voter approval of a bond issuance before either the capital or the legislature can be relocated. Specifically, it would amend AS 44.06.050-.060. These provisions require that a nine-member commission determine all costs of relocating any present functions of state government required by initiative or legislative enactment, and further require that state funds cannot be expended to relocate either the capital or the legislature until a majority of voters at a statewide election first approve a bond measure to fund the relocation. Finally, the bill would amend any other statute that currently allows legislative meetings to be held elsewhere in the state, thereby restricting future regular and special legislative session meetings to Anchorage. 19MALA is four sections long, and provides as follows:

Section 1 would require that all regular and special meetings of the Alaska Legislature be held in Anchorage, Alaska.

Section 2 contains two sentences. The first sentence would establish that the requirements of AS 44.06.050-.060 do not apply to the relocation of legislative meetings. Those statutes mandate that (1) a commission be convened to determine the costs required by any initiatives or legislative enactments authorizing relocation of any present functions of state government; (2) the commission determine all bondable and total costs of any such proposed move; and (3) before any state funds are expended to relocate physically the capital or the legislature from its present location in Juneau, voters in a statewide election must first approve a bond issue that includes all bondable costs to the state of the relocation over the twelve-year period following voter approval.

The second sentence of section two would explicitly amend AS 44.06.050-AS 44.06.060[1] to state that those statutes do not apply to the location of legislative meetings.

Section 3 would provide that any state statute or regulation that "states or implies" that the Legislature must or should meet in the state capital—or anywhere other than Anchorage—is repealed to the extent it would conflict with the bill.

Section 4 contains a severability clause.

II. Analysis.

Under AS 15.45.070, the lieutenant governor must review an application for a proposed initiative bill within sixty calendar days of receipt and "certify it or notify the initiative committee of the grounds for denial." The application for the 19MALA initiative was filed with the Division of Elections on February 4, 2019. The sixtieth calendar day after the filing of the initiative is Friday, April 5, 2019.

Under AS 15.45.080, certification shall be denied only if: "(1) the proposed bill to be initiated is not confined to one subject or is otherwise not in the required form; (2) the application is not substantially in the required form; or (3) there is an insufficient number of qualified sponsors."

A. Form of the proposed initiative bill.

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[1] The second sentence of section two refers to "AS 44.06.05 through AS 44.00.060." This appears to be a minor drafting error, as there is no AS 44.00.060. We believe the drafters intended the text of the second sentence to read "AS 44.06.050 through AS 44.06.060," which would be consistent with both the text of the first sentence and the statutory scheme.

In evaluating an application for an initiative bill, you must determine whether the application is in the "proper form."[2] Specifically, you must decide whether the application complies with "the legal procedures for placing an initiative on the ballot, and whether the initiative contains statutorily or constitutionally prohibited subjects which should not reach the ballot."[3]

The form of an initiative bill is prescribed by AS 15.45.040, which requires four things: (1) that the bill be confined to one subject; (2) that the subject be expressed in the title; (3) that the bill contain an enacting clause stating: "Be it enacted by the People of the State of Alaska"; and (4) that the bill not include prohibited subjects. The list of prohibited subjects is found in article XI, section 7 of the Alaska Constitution and AS 15.45.010. An initiative includes a prohibited subject when it makes or repeals appropriations; enacts local or special legislation; dedicates revenue; or creates courts, defines their jurisdiction, or prescribes their rules.[4] You may deny certification only if the measure violates one of more of these restrictions.[5]

The initiative bill meets all four requirements of AS 15.45.040. It is confined to one subject—the location of meetings of the Alaska Legislature. The subject is expressed in the title, and the bill has the required enacting clause. Finally, as explained further below, it does not include a prohibited subject.

The substance of the bill is primarily contained in the first and second sections. The first section would require that all legislative meetings be held in Anchorage, rather than Juneau, the state capital—or elsewhere in the state. The second section would exempt the bill from the cost study, voter approval, and bonding requirements found in AS 44.06.050-.060, which apply to efforts to relocate the capital or the legislature.[6] As discussed below, although these statutory cost assessment and bonding requirements apply to relocation of "the capital or the legislature," and the bill is about moving "*meetings* of the legislature," it is impossible to meaningfully differentiate the location of "the legislature" from the location of all meetings of the legislature. While the bill would

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2 Alaska Const. art. XI, § 2.

3 *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 87 n.7 (Alaska 1988).

4 AS 15.45.010; *see also* Alaska Const. art. XI, § 7 (prohibiting dedicating revenue, creating courts, defining court jurisdiction or prescribing court rules).

5 *See Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 900 n.22 (Alaska 2003) (*citing Brown v. Bd of Educ.*, 349 U.S. 294 (1955)).

6 *See* AS 44.06.050.

theoretically allow for legislative *offices* to remain in Juneau, it is hard to imagine that legislators would not move their offices, personnel, and operational needs with them to Anchorage, where all legislative meetings would occur. Thus, from a practical standpoint, section two appears to effectuate a partial repeal of AS 44.06.050-.060.

In reviewing the bill, we carefully considered whether the initiative included a prohibited subject, either by making or repealing an appropriation, or by enacting local or special legislation. We conclude the provision does not constitute an impermissible appropriation or repeal of an appropriation, or enact local or special legislation. The Alaska Supreme Court has adopted a "deferential attitude toward initiatives"[7] and has consistently recognized that the constitutional and statutory provisions pertaining to the use of the initiative should be liberally construed in favor of allowing an initiative to reach the ballot.[8] Indeed, the Court has "sought to preserve the people's right to be heard through the initiative process wherever possible."[9]

Looking to sections one and three, which require that legislative meetings be held in Anchorage, we conclude that the bill would not enact special or local legislation. This issue has already been squarely addressed by the Alaska Supreme Court. In *Boucher v. Engstrom*, the Court affirmed the Lieutenant Governor's decision to certify an initiative to relocate the capital from Juneau to a site other than Anchorage and Fairbanks. The Court recognized that "the question of the location of Alaska's capital has obvious statewide interest and impact. Access to Alaska's seat of government is of substantial importance to citizens of Alaska throughout the state," and that "[l]egislation . . . need not operate evenly on all parts of the state to avoid being classified as local or special."[10] The *Boucher* court further held that even if a proposed initiative did not have statewide application, it would be constitutional so long as the initiative "bears a fair and substantial relationship to legitimate purposes."[11] The Court relied in part on an Oklahoma Supreme Court decision holding that the very fact that a measure would

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7 *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1181 (Alaska 1985).

8 *McAlpine v. University of Alaska*, 762 P.2d a81, 91 (Alaska 1988); *Yute Air*, 698 P.2d at 1181.

9 *Hughes v. Treadwell*, 341 P.3d 1121, 1125 (Alaska 2015); *Pebble Ltd. P'ship ex rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064, 1076 (Alaska 2009).

10 *Boucher v. Engstrom*, 528 P.2d 456, 461, 463-64 (Alaska 1974).

11 *Id.* at 464.

relocate the capital to a particular spot "does not make it a special law."[12] Similarly here, the bill's requirement that meetings of the Alaska Legislature be held in a single location—Anchorage—does not make it a special law. On the contrary, the location of the Alaska Legislature, like the location of the capital, is plainly a matter of statewide interest.[13] Accordingly, in 2001 the Lieutenant Governor's Office certified an initiative application that proposed relocating legislative sessions from Juneau to the Matanuska-Susitna Borough.[14] And in 1993, our office recommended certification of an initiative petition providing for the capital to be moved to Wasilla.[15] The bill therefore does not enact special or local legislation.

The bill also does not violate the Alaska Constitution's prohibition on making or appealing appropriations by initiative.[16] The proposed initiative does not itself make an appropriation, which "involves setting aside funds for a particular purpose."[17] Rather, section two of the bill exempts the relocation of legislative meetings from statutory provisions that would otherwise appear to mandate a cost analysis, statewide vote, and bond issuance before any such legislative relocation could occur. This effort does not violate the ban on appropriations by initiative, nor contravene the two "core objectives" of the constitutional limitation, which are "(1) to prevent give-away programs that appeal to the self-interest of voters and endanger the state treasury; and (2) to preserve legislative discretion by ensuring that the legislature, and only the legislature, retains control over the allocation of state assets among competing needs."[18] This bill does not threaten nor impede the legislature's power to control state spending or expend funds,

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12 *Id.* at 462 (*quoting Coyle v. Smith*, 113 P.944 (1911).

13 Even if it were not, a reasonable factual basis to exists to support moving legislative meetings to the state's main population center.

14 *See Alaskans for Effficient Government, Inc. v. Knowles*, 91 P.3d 273, 274 (Alaska 2004).

15 1993 Inf. Op. Att'y. Gen. (August 24; 663-94-0113).

16 Alaska Const. Art. IX, § 7.

17 *McAlpine*, 762 P.2d at 88.

18 *Lieutenant Governor of State v. Alaska Fisheries Conservation Alliance, Inc.*, 363 P.3d 105, 108 (Alaska 2015). While 19MALA effectively repeals the current statutory cost-study, election, and bonding mandates, it does not *prohibit* the legislature from later electing to appropriate funds to carry out a study or fund the costs of the relocation.

and it ultimately leaves to the legislature discretion regarding any future appropriations.[19] As a result, it does not violate the ban on appropriations by initiative.

We acknowledge, however, that some of the bill's language is potentially contradictory or confusing. For example, there is an obvious tension between the first two sentences of section two. The first sentence states that the commission cost study, voter approval, and bonding provisions of AS 44.06.050-.060 "shall not apply" to the bill. But as currently written, AS 44.06.060 instructs that a commission must "determine the costs required by initiatives . . . authorizing relocation of any of the present functions of state government," and AS 44.06.055 provides that state monies may not be expended to relocate the legislature until after a statewide election at which voters approve a bond issue for the bondable costs of the relocation. Therefore on their face, those provisions do appear to apply here. But the second sentence of section two provides that AS 44.06.050-.060 "are amended to state that they do not apply to the location of legislative meetings." By proposing to explicitly amend those statutes, the second sentence of section two thus appears to trump the first and acknowledge—at least implicitly—that but for this proposed amendment, those provisions would otherwise apply.

Relatedly, we acknowledge there could be some potential confusion about the bill's effect. The bill as drafted purports to move only "meetings" of the Alaska Legislature to Anchorage. The sponsors' language thus appears to be an attempt to distinguish a relocation of "the legislature" from a move of all legislative "meetings."[20] But the effect of this bill—although not explicit in its text—would be to relocate the legislature. Indeed, it is not at all apparent how the concepts differ on any practical level. The Alaska Constitution provides for both regular and special sessions of the legislature, but does not mandate where they occur.[21] By statute, however, the legislature must "convene" at the capital in Juneau, although special sessions may be held "at any location in the state."[22] Regular meetings of the Alaska Legislature historically occur in Juneau,

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19 1993 Inf. Op. Att'y Gen. (August 24; 663-94-0113).

20 The Alaska Legislature is created by Article II of the Alaska Constitution. "The legislative power of the State is vested in a legislature consisting of a senate with a membership of twenty and a house of representatives with a membership of forty." Alaska Const. Art. II, §2; *See also* AS 24.05.010-.020.

21 Alaska Const. Art. II §8 (regular sessions), §9 (special sessions).

22 AS 24.05.090 ("The legislature shall convene at the capital each year on the third Tuesday in January at 1:00 p.m."); AS 24.05.100(b) ("A special session may be held at any location in the state."); AS 44.06.010 (declaring Juneau the capital of Alaska).

and multiple statutes contemplate that the functions of state government, including legislative meetings, occur there.[23] By proposing to move "[a]ll regular and special meetings of the Alaska Legislature" to Anchorage, the bill appears to contemplate a move of "the legislature" itself, and thus contemplate a partial repeal of AS 44.06.050-.060.[24] Still, we do not believe that these issues affect your review. As explained above, the Lieutenant Governor's review of a proposed initiative is limited to the form of the application and the proposed bill for compliance with constitutional and statutory provisions, and therefore the bill should not be rejected because of these perceived ambiguities.[25]

Finally, we recognize that the bill is not drafted in conformity with the Legislative Affairs Agency's Manual of Legislative Drafting (2019). For example, section two of the bill provides that "[t]he provisions of AS 44.06.050 through AS 44.00.060[sic] are amended to state that they do not apply to the location of legislative meetings," but the bill provides no proposed language to that effect. Similarly, section three provides that "[a]ny and all language in any statute or regulation" that "states or implies that the Legislature must or should meet in the capital or elsewhere than Anchorage is repealed to

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[23] *See* AS 24.10.130(a) ("A member of the legislature may be entitled to reimbursement for the expenses of moving between the member's place of residence and the capital city for the purpose of attending a regular session of the legislature."); AS 24.06.031 (creating exemption on certain restrictions on legislative employee fundraising when "in the capital city or in the municipality in which the legislature is convened in special session if the legislature is convened in a municipality other than the capital city" during the 90 days preceding election); AS 24.10.030 (providing chief clerk and senate secretary "shall remain at the capital until the completion of their work is determined by the director of the [legislative] council."); AS 44.99.007 (authorizing governor to declare by proclamation emergency temporary location or location for the seat of government when, due to emergency resulting from effects of enemy attack or imminent enemy attack, "it becomes imprudent, inexpedient, or impossible to conduct the affairs of state government at the normal location of the state government."). By statute, Juneau is the "capital city." AS 44.06.010.

[24] Our conclusion is reinforced by the overall statutory language of AS 44.06.et seq. Although AS 44.06.050 is intended to guarantee the people of Alaska "their right to know and to approve in advance all costs" of relocating only "the capital and the legislature," the language of 44.06.060, which requires the creation of a commission to determine the costs of any such relocation, appears somewhat broader in that it applies to the costs of relocating "any of the present functions of state government."

[25] *See* 1993 Inf. Op. Att'y Gen. (November 29; 663-94-0083) (citing *Boucher v. Engstrom*, 528 P.2d at 460 n.13).

the extent of that type of statement or implication," but it does not endeavor to identify those provisions. The drafting manual, however, provides that *after* determining which specific statutes must be changed to achieve the requester's purpose, the drafter should follow one of three techniques to amend a statute: regular amendment, repeal and reenactment of the affected section with the same coding, or repeal of the affected section and enactment of a new section with different coding—none of which appear to have been followed here. (Manual at 16) The Manual also requires that drafters of provisions creating new statutes—as section one would do—should give the new proposed section or chapter coding that will place it close to related sections of existing statutes. Section one offers no title or chapter identifier. Still, as outlined above, we do not believe these technical drafting irregularities are a basis to deny certification. There is no requirement in AS 15.45.030 or AS 15.45.040 that initiatives comply with the Manual of Legislative Drafting. In addition, our office has previously advised against denying certification based solely on nonconformance with the drafting manual so long as the constitutional standards are met, recognizing that if the bill were enacted, any defects would be corrected by the revisor of statutes.[26]

B. Form of the application.

The form of an initiative application is prescribed by AS 15.45.030, which provides that the application must include the

(1) proposed bill;

(2) printed name, the signature, the address, and a numerical identifier of not fewer than 100 qualified voters who will serve as sponsors; each signature page must include a statement that the sponsors are qualified voters who signed the application with the proposed bill attached; and

(3) designation of an initiative committee consisting of three of the sponsors who subscribed to the application and represent all sponsors and subscribers in matters relating to the initiative; the designation must include the name, mailing address, and signature of each committee member.

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[26] 1989 Inf. Op. Att'y Gen. (December 1; 663-90-0141)(citing 1989 Inf. Op. Att'y Gen. at 4 (Mar. 21; 663-89-0306)); 1986 Inf. Op. Att'y Gen. at 2 (April 10; 663-86-0394, 0422). *See also* AS 01.05.031(b) (providing "revisor shall edit and revise the laws for consolidation without changing the meaning of any law" and directing procedure for doing so).

The application meets all three requirements. While an initial review of the proposed initiative may not appear to be a "bill" in the sense that it lacks the title and chapter identifier typically used and referenced in the Manual of Legislative Drafting, the language plainly amounts to a proposed change in state law, and is a "bill" as that term is generally understood.[27]

The second requirement regarding the necessary number of qualified sponsors is also met. We understand that the Division of Elections has reviewed the sponsor signatures and determined that the application contains the signatures and addresses of 191 qualified voters. The application also includes a designation of an initiative committee, who subscribed to the application, thus satisfying the third element.

III. Proposed ballot and petition summaries.

We have prepared a ballot-ready petition title and summary to assist you in complying with AS 15.45.090(2) and AS 15.45.180, as is our office's standard practice. Under AS 15.45.180 a ballot proposition must include a "true and impartial summary of the proposed law." That provision also requires that an initiative's title be limited to twenty-five words, and that the number of words in the body of the summary be limited to the number of sections in the proposed law multiplied by fifty. "Section" is defined as "a provision of the proposed law that is distinct from other provisions in purpose or subject matter."

19MALA Ballot Summary Proposal

Because the bill has four sections, the maximum number of words in the summary may not exceed 200. There are thirteen words in the title and 74 words in the following summary, which we submit for your consideration:

An Act Requiring Meetings of the Alaska Legislature To Be Held in Anchorage

> This act would amend state law to require that all meetings of the Alaska Legislature, including regular and special sessions, be held in Anchorage. If passed, this bill would also exempt the relocation from current laws which mandate that before the legislature may be moved, (1) a commission must determine the costs of the relocation; and (2) voters at a statewide election must approve a bond issuance to fund the total costs of the move.

Should this initiative become law?

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[27] The Alaska Legislature's glossary of legislative terms defines "bill" as "[a] proposed law that has been introduced in either house of the Legislature. Also known as a measure." http://akleg.gov/docs/pdf/glossary.pdf (last visited March 7, 2019).

This summary has a Flesch test score of 49.1. We believe the summary satisfies the target readability standards of AS 15.80.005.[28]

IV. Conclusion.

The proposed bill and application is in the proper form and the application complies with the constitutional and statutory provisions governing the use of the initiative. We therefore recommend that you certify the initiative application and notify the initiative committee of your decision. You may then begin to prepare a petition under AS 15.45.090.

Please contact us if we can be of further assistance to you on this matter.

Sincerely,

KEVIN J. CLARKSON
ATTORNEY GENERAL

By:
Janell Hafner
Assistant Attorney General

JMH/ijg

[28] Under AS 15.80.005(b), "The policy of the state is to prepare a neutral summary that is scored at approximately 60." While this is below the target readability score of 60, the Alaska Supreme Court has upheld ballot summaries scoring as low as 33.8 for a complicated ballot initiative. *See* 2007 Op. Att'y Gen. (Oct. 17; 663-07-0179); *Pebble*, 215 P.3d at 1082-84. In our view, the nature of the amendments in section two regarding statutory requirements about a relocation cost assessment and bond issuance make it difficult to provide a summary with a higher readability score.

STATE OF ALASKA
DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

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November 8, 2007

The Honorable Sean R. Parnell
Lieutenant Governor
P.O. Box 110015
Juneau, Alaska 99811-0015

Re: Review of 07WIFI Initiative Application
A.G. file no: 663-08-0036

Dear Lieutenant Governor Parnell:

I. INTRODUCTION

You have asked us to review an application for an initiative entitled "An Act to provide for cleaner waters in Alaska by prohibiting pollution mixing zones in wild salmon and other fisheries spawning waters."

We find no legal problems with the bill and so we recommend that you certify the application.

II. SUMMARY OF THE PROPOSED BILL

The bill is comprised of three sections. Section 1 of the bill states that the purpose of the bill is to protect water quality in the state by prohibiting mixing zones in water used by salmon and resident fish.

Section 2 of the bill amends AS 46.03 to add a new statute, AS 43.06.065,[1] providing for the prohibition of mixing zones in spawning waters. We first note that the definition in this section of "spawning" includes not only spawning, but also rearing and migration. Given this broad definition, the scope of this bill could potentially include most of the waters in which fish are present in the state.

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[1] The drafter probably intended the bill to create a new statute numbered AS 43.03.065.

Subsection (a) of proposed AS 46.03.065 prohibits the Department of Environmental Conservation from permitting mixing zones in an area of anadromous or resident fish spawning. Resident fish is defined to include arctic char (Dolly Varden), arctic grayling, brook trout, burbot, cutthroat char, lake trout, landlocked coho, king, and sockeye salmon, northern pike, rainbow trout, sheefish and whitefish.

Subsection (b) of proposed AS 46.03.065 provides an exception to the mixing zone prohibition for turbidity for a suction dredge or mechanical placer mine so long as the mixing zone is authorized by DEC, it does not extend more than 500 feet downstream of the point of discharge, the closest other mixing zone is more than 500 feet away, and if required by law discharge is restricted during periods of spawning and DEC finds that the mixing zone will not adversely affect the area for spawning.

Subsection (c) of proposed AS 46.03.065 provides an exception to the mixing zone prohibition for operators of shore-based seafood processors.

Subsection (d) of proposed AS 46.03.065 provides an exception to the mixing zone prohibition for operators of publicly owned sewage treatment plants that discharge less than one million gallons per day.

Subsection (c)[2] of proposed AS 46.03.065 sets forth the definitions in the provision.

Section 3 of the bill contains a severability clause similar in substance to AS 01.10.030. Section 3 also provides "[u]pon enactment, the state shall take all actions necessary to ensure the maximum enforceability of this act."

Before we turn to our analysis of this bill, we think it would be useful to provide some background regarding mixing zones. State regulation defines "mixing zone" as "a volume of water, adjacent to a discharge, in which wastes discharged mix with the receiving water." 18 AAC 70.990(38). Mixing zones are a limited area at the outlet of a discharge point in which a liquid waste discharge may be further diluted by water. On a case-by-case basis, DEC may allow within such mixing zones certain water quality criteria to be exceeded. 18 AAC 70.240. The point of such mixing zones is to provide a limited area in which a liquid waste discharge stream may be further diluted so that once the discharge stream exits the mixing zone, it will satisfy applicable water quality standards.

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[2] The drafter probably intended to label this subsection (e).

There are similarities and differences in the scope of the current regulation and the bill. The Alaska mixing zone regulation prohibits mixing zones in spawning areas for both anadromous fish as well as resident fish. 18 AAC 70.240(e) and (f). Thus, the biological scope of current regulation and the bill is the same. The geographical scope of the bill, however, is much broader than existing regulation because in current regulation "spawning" means spawning, and in the bill "spawning" means spawning, rearing and migration.

There are also similarities and differences in the exceptions set forth in the current regulation and the bill. Current regulation contains an exception to the prohibition against mixing zones in spawning areas for resident fish only, conditioned on the applicant demonstrating that the mixing zone will not cause harm to the spawning area. 18 AAC 70.240(g). The bill provides for certain industry category exceptions to the prohibition against mixing zones, *i.e.*, for certain placer mines, shore-based seafood processors, and certain public sewage treatment works, that do not exist in the current mixing zone regulation. It is possible, however, for such entities to apply for an exception in a resident fish spawning area under 18 AAC 70.240(g). The important difference to note, however, is that the current regulatory exception does not extend to anadromous fish, whereas the bill's exceptions do.

We note the possibility that were this initiative to be enacted it could be interpreted to provide less protection for anadromous fish with respect to the identified industry category exceptions. We further note that the federal Environmental Protection Agency approves state mixing zone regulations before they may be implemented. 40 C.F.R. § 131.13. It is therefore possible that the EPA will decline to approve the mixing zone exceptions in this initiative because they potentially provide less protection for anadromous fish than existing regulation.

III. ANALYSIS

Under AS 15.45.070, the lieutenant governor is required to review an application for a proposed initiative and either "certify it or notify the initiative committee of the grounds for denial" within 60 days of receipt. The grounds for denial of an application are that (1) the proposed bill is not in the required form; (2) the application is not substantially in the required form; or (3) there is an insufficient number of qualified sponsors. AS 15.45.080. We discuss these next.

A. FORM OF THE PROPOSED BILL

The form of a proposed initiative bill is prescribed by AS 15.45.040, which requires that (1) the bill be confined to one subject; (2) the subject be expressed in the title; (3) the enacting clause state, "Be it enacted by the People of the State of Alaska"; and (4) the bill not include prohibited subjects. The prohibited subjects – dedication of revenue, appropriations, the creation of courts or the definition of their jurisdiction, rules of court, and local or special legislation – are listed in AS 15.45.010 and in art. XI, sec. 7, of the Alaska Constitution.

The bill satisfies each of these four requirements. It is confined to one subject, the prohibition of mixing zones in spawning waters. The subject of the bill is expressed in the title ("to provide for cleaner waters in Alaska by prohibiting pollution mixing zones in wild salmon and other fisheries spawning waters"). The enacting clause is set out correctly. The bill does not contain any of the prohibited subjects.

We have previously expressed our view that an initiative may not prohibit the use of public assets such as land or water in a manner that amounts to an appropriation of such public assets. 2007 Op. Att'y Gen. (June 21; 663-07-0179). This initiative prohibits the use of most waters of the state for mixing zones. We think it would be useful to explain why we do not think this bill amounts to an appropriation under our previous opinion.

Mixing zones are essentially an exemption to the regulatory water quality scheme. The permitting agency allows the permittee within a narrow circumscribed area to exceed certain applicable water quality regulatory limitations. For instance, an industrial user may discharge a waste stream that contains 2 parts per billion more of a substance than is permitted by water quality regulations. A mixing zone of 500 feet from the discharge point will allow the waste stream to further dilute to the point where the water quality level at the exit point of the mixing zone is within the applicable water quality regulations.

This bill does not prohibit the use of water. It instead prohibits the granting of a regulatory exemption. Enactment of this bill would mean that the water quality level at all discharge points must be within the applicable regulatory limits. The state's water may still be used for discharges, therefore the bill does not appropriate the use of water.

B. THE FORM OF THE APPLICATION

The form of an initiative application is prescribed in AS 15.45.030, which provides:

> The application must include the
>
> (1) proposed bill;
>
> (2) printed name, the signature, the address, and a numerical identifier of not fewer than 100 qualified voters who will serve as sponsors; each signature page must include a statement that the sponsors are qualified voters who signed the application with the proposed bill attached; and
>
> (3) designation of an initiative committee consisting of three of the sponsors who subscribed to the application and represent all sponsors and subscribers in matters relating to the initiative; the designation must include the name, mailing address, and signature of each committee member.

AS 15.45.030. The application meets the first and third requirements as well as the latter portion of the second requirement regarding the statement on the signature page. With respect to the first clause of the second requirement, the Division of Elections within your office determines whether the application contains the signatures and addresses of not less than 100 qualified voters.

C. NUMBER OF QUALIFIED SPONSORS

The Division of Elections within your office will determine whether there are a sufficient number of qualified sponsors.

IV. PROPOSED BALLOT AND PETITION SUMMARY

We have prepared the following ballot-ready petition summary and title for your consideration:

BILL PROHIBITING MIXING ZONES IN WATER USED BY FISH FOR SPAWNING, REARING AND MIGRATION

This bill would prohibit mixing zones in water used by salmon and resident fish for spawning, rearing and migration. A mixing zone is an area in water into which liquid wastes may be discharged and exceed water quality criteria. The purpose of a mixing zone is to allow wastes to be diluted so that they meet water quality criteria when they exit the mixing zone. The bill provides exceptions to the prohibition against mixing zones for certain users including some kinds of placer mines, shore-based seafood processors and public water works that process less than 1 million gallons of water a day.

Should this initiative become law?

This summary has a Flesch test score of 44.9. We believe that the summary meets the readability standards of AS 15.60.005.

V. CONCLUSION

For the above reasons, we find that the proposed bill is in the proper form, and therefore recommend that you certify this initiative application.

Please contact me if we can be of further assistance to you on this matter.

Sincerely,

TALIS J. COLBERG
ATTORNEY GENERAL

By: Michael A. Barnhill
Michael A. Barnhill
Senior Assistant Attorney General

MAB/ajh

cc: Whitney Brewster, Director of Division of Elections

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Subject: 3AN-19-11106 CI: Vote Yes for Alaska's Fair Share's Reply in Support of Its Motion for Summary
Date: 5/22/2020 12:53:34 PM

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Attorneys for Plaintiff

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

VOTE YES FOR ALASKA'S FAIR SHARE, Plaintiff, v. KEVIN MEYER, LIEUTENANT GOVERNOR OF THE STATE OF ALASKA, and STATE OF ALASKA, DIVISION OF ELECTIONS, Defendants.	Case No. 3AN-19-11106 CI

FAIR SHARE'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

The Alaska Supreme Court has long held that an initiative should be "presented clearly and honestly to the people of Alaska."[1] To achieve this, a summary of the proposed law must

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[1] *Planned Parenthood*, 232 P.3d at 731 (quoting *Faipeas v. Municipality of Anchorage*, 860 P.2d 1214, 1221 (Alaska 1993)).

be "'a fair, concise, true and impartial statement of the intent of the proposed measure,'"[2] "'free from any misleading tendency, whether of amplification, of omission, or of fallacy, and . . . . must contain no partisan coloring.'"[3] In emphasizing "the important right of the people to enact laws by initiative," the Alaska Supreme Court has recognized that the "theory of initiative legislation [is] based upon the security that the legislation proposed and petitioned for by the people shall be voted upon at the polls by them without interference, revision, or mutilation by any official or set of officials[.]"[4]

In response to this clear legal authority protecting the initiative process from the very type of bias exhibited in this case, Defendants first ask this Court to ignore the history of bias in this case.[5] A history of bias that shaped by, if not formed entirely, not one, but two untrue,

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[2] *Planned Parenthood*, 232 P.3d at 731 (quoting *Burgess v. Alaska Lieutenant Governor*, 654 P.2d 273, 275 (Alaska 1982)).

[3] *Planned Parenthood*, 232 P.3d at 731 (quoting *Pebble Ltd. P'ship ex. rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064, 1083 (Alaska 2009)).

[4] *McAlpine v. University of Alaska*, 762 P.2d 81, 93 (Alaska 1988) (quoting *Bennett v. Drullard*, 27 Cal.App. 180, 149 P. 368 (Cal. App. 1915)). The Court disagreed with *Bennett* in holding that "circumspect judicial exercise of the power to sever impermissible portions of initiatives will promote, rather than frustrate" the constitutional right and practical recourse of the sponsors. *Id.*

[5] A history of Defendant Meyer's active and unprecedented role as the deciding vote in the Senate to pass the very tax subsidies for his employer the Fair Share Act is seeking to amend and make more fair to Alaskans. A history of a rambling and disjointed Attorney General Opinion ("AGO") that speaks with multiple voices often in direct contradiction to themselves regarding every substantive issue raised in this case. An AGO that devoted pages advancing post-enactment issues clearly beyond the scope of assistance anticipated by the underlying statutes and then retreating to offering no opinion on those same post-enactment issues it so freely raised. An AGO that makes little attempt to prepare a true and impartial summary of the Fair Share Act. An AGO summary that was accepted in whole by Defendant Meyer as his

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partial, and biased summaries of key provisions of the Fair Share Act[6]—the Summary[7] and the Amended Summary.[8] Vote Yes for Alaska's Fair Share ("Fair Share") disagrees with Defendants and believes this history of bias is directly relevant to this Court's consideration because it reveals bias against the Fair Share Act that should not be memorialized in its summary on the ballot.

Fair Share will focus this Reply on the sole issue of substance remaining before the Court: should the last sentence of the Amended Summary—which reads "This would mean the normal Public Records Act process would apply."—be removed.[9] Defendants have failed to articulate how this biased interpretive language represents a summary of the words "shall be a matter of public record" in Section 7 of the Fair Share Act ("Section 7") at all, much less truly and impartially. Defendants have not advanced a single case or statute in which the words "shall be a matter of public record" have been interpreted to mean "will remain confidential," the exact meaning intended by Defendants in offering their biased interpretative language. Nor have Defendants offered any rational explanation as to why an initiative would be put forward with the intention of simply maintaining the existing law on confidentiality. Indeed, and perhaps most importantly, Defendants have not articulated why the actual words "shall be a

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own. A history of the Defendants refusing to discuss by phone or correct obvious mistakes-despite have been sent redlined corrections on two occasions.

6 Exhibit A attached to Motion, Fair Share Act.

7 Exhibit B attached to Motion, AGO at 11-12 ("Summary").

8 Exhibit D attached to Motion, Letter from Meyer to Brena ("Amended Summary").

9 Fair Share has already refuted Defendants' procedural efforts to continue to advance an untrue, partial, and biased Amended Summary to the Alaskan voters in its Opposition dated May 15, 2020.

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matter of public record" set forth in Section 7 require their biased interpretation in the first instance. This Court should require Defendants to remove the biased interpretive language they have added to shape the meaning of Section 7 into something that was clearly not intended. This Court should allow Alaskan voters to decide for themselves what the words "shall be a matter of public record" mean in the voting booth and not permit Defendants' biased pre-enactment interpretation to confuse the matter.

I. The Amended Summary cannot be separated from the original summary and the AGO supporting it.

In their Opposition, Defendants endeavor to explain why they have maintained the reference to the "normal Public Records Act process" rather than simply remove the sentence and let the Fair Share Act speak for itself.[10] Fair Share must again note that if Defendants had been willing to discuss this position and the other conceded issues with Fair Share prior to litigation, the parties and the Court might have been spared much time and effort.

To briefly reiterate, Section 1 of the Fair Share Act provides, "Notwithstanding Any Other Statutory Provisions to the Contrary, the Oil and Gas Production Tax in AS 43.55 Shall Be Amended as Follows:". In turn, Section 7 provides, "All filings and supporting information provided by each producer to the Department relating to the calculation and payment of the taxes set forth in Sections 3 and 4 shall be a matter of public record." The AGO correctly recognized how this would change the status quo: "[Section 7] would conflict with current law that actually makes it a crime to disclose confidential tax documents. [Footnote omitted] Based

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[10] Defendants' Opposition at 12-17 (May 15, 2020).

on the 'Notwithstanding . . .' language, we assume this provision is intended to supersede the existing statute for any tax documents submitted for areas falling under section 2 of the initiative bill."[11] But this plain reading was not expressed in the original Summary, which stated: "The Act would also make all tax documents relating to the calculation and payment of the new taxes a matter of public record. This would mean the documents would be reviewed under the normal Public Records Act process, and any information that needed to be withheld, for example for privacy or balance-of-interests reasons, would be withheld."

The Amended Summary shortens the erroneous sentence but does nothing to depart from its stated reasoning. Given the AGO's observation that the normal Public Records Act process would result in "most, if not all, of the tax documents" remaining confidential,[12] Defendant Meyer's remaining interpretative sentence in the Amended Summary would render Section 7 entirely meaningless because there would be no change whatsoever to the confidential status of tax filings under the Fair Share Act. Interpreting a provision as meaningless is not a true or impartial summary.

If the remaining sentence in the Amended Summary was a plain procedural note on how the public information would be accessed, as Defendants suggest,[13] it would merely be superfluous, but in the context of the original Summary and the reasoning of the AGO, stating

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[11] Exhibit B attached to Motion, AGO at 6.
[12] Exhibit B attached to Motion, AGO at 6.
[13] Defendants' Opposition at 16-17 (May 15, 2020).

that "the normal Public Records process would apply" is not true and impartial, but the exact opposite of the plain meaning, the obvious intent of the language, the publicly stated intentions of the sponsors,[14] and the AGO's own acknowledgment of the sponsors' intention.

II. "Matter of Public Record" does not mean "subject to the Public Records Act," but this Court need not decide that interpretive issue.

Defendants argue the last sentence of the Amended Summary is true and impartial because "1) the Alaska Public Records Act is being amended in the initiative and 2) that the taxpayer information identified in the initiative would be available to the public in the same manner as other public records – the normal Public Records Act process."[15] In further stating that "[i]nstead of being treated as confidential, the taxpayer information in Section 7 would be a matter of public record under the Alaska Public Records Act," Defendants appear to conflate the term "matter of public record" with the terms "public record" and "public document," when those terms have distinct definitions.[16]

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[14] *See* Exhibits F-H attached to Motion and Exhibit K attached hereto, printout from Fair Share website regarding transparency.

[15] Defendants' Opposition at 13-14 (May 15, 2020).

[16] *See* RECORD, Black's Law Dictionary (11th ed. 2019) ("public record. (16c) A record that a governmental unit is required by law to keep, such as land deeds kept at a county courthouse. • Public records are generally open to view by the public. *Cf. public document* under DOCUMENT (2).;" DOCUMENT, *Id.* ("- public document. (17c) A document issued or published by a political body or otherwise connected with public business. *Cf. public record* under record."); MATTER, *Id.* ("matter of record. (16c) A matter that has been entered on a judicial or other public record and can therefore be proved by producing that record.").

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To be clear, the term "matter of public record" is not defined in the Public Records Act, but its meaning is obvious in every Alaska statute in which it is used: the opposite of confidential.[17] As Fair Share has already briefed, this is the common meaning of the term as used by courts across the country,[18] and Defendants offer no authority providing that a "matter

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[17] *See* AS 08.18.021(b) ("The information contained in the application shall be a matter of public record and open to public inspection."); AS 27.21.100(c)(1),(2) (information "must be kept confidential and not made a matter of public record"); AS 37.10.230(b) (disclosure "is a matter of public record and shall be included in the minutes of the board meeting next following the disclosure."); AS 37.13.110(b) (disclosure "is a matter of public record and shall be included in the minutes of the board meeting next following the disclosure."); AS 40.25.100(a) (information "that discloses the particulars of the business or affairs of a taxpayer or other person . . . is not a matter of public record [and] shall be kept confidential"); AS 44.25.028(b) (disclosure "is a matter of public record and shall be included in the minutes of the board meeting next following the disclosure."); AS 44.88.215(a) ("unless the records or information were a matter of public record before submittal to the authority, the following records and information shall be kept confidential"); AS 14.03.110(a) (questionnaire or survey impermissible if it "inquires into personal or private family affairs of the student not a matter of public record or subject to public observation"); AS 44.33.020(a)(36) (" data collected under this paragraph that discloses the particulars of an individual business is not a matter of public record and shall be kept confidential"); AS 38.05.810(c) ("Any information provided the state in the course of an audit becomes a matter of public record.").

[18] *See, e.g., Downie v. Superior Court*, 888 P.2d 1306, 1308 (Alaska App. 1995) ("[T]he date set for trial is a matter of public record and cannot conceivably be considered confidential.") (quoting *State v. Bilton*, 36 Or.App. 513, 585 P.2d 50, 52 (1978)); *William E. Schrambling Accountancy Corp. v. U.S.*, 937 F.2d 1485, 1487–90 (9th Cir. 1991) (granting judgment in favor of government's position that recording of liens "made the information a matter of public record to which no reasonable expectation of privacy could attach" and no longer confidential); *Rodgers v. Hyatt*, 697 F.2d 899, 902 (10th Cir. 1983) ("It is well established under the law dealing with actions for invasion of privacy that no reasonable expectation of privacy attaches to those matters that are a matter of public record.") (citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975); Restatement (Second) of Torts, Explanatory Notes, Section 652D, comment b, at 385 (1977) ("Thus there is no liability for giving publicity to facts about the plaintiff's life that are matters of public record")); *In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 19 (C.A.1 2003) ("matters of public record

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of public record" means subject to the Public Records Act. A matter of public record is not subject to the "normal Public Record Act process" of determining whether to withhold information as described in the AGO but rather is beyond such a process and *cannot* be withheld. Fair Share is not asking the Court to render judgment on what "matter of public record" means in the initiative,[19] but the Defendants cannot ask Fair Share and this Court to ignore the analysis of the AGO underlying both the Summary and the Amended Summary, particularly as opponents of the Fair Share Act will certainly point to that language in attempting to limit the initiative' s scope and effect upon enactment by the voters. As the plain text of the initiative speaks for itself, striking the interpretive sentence would not be an omission, but a more accurate summary without the partiality of imposing one interpretation.

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are fair game in adjudicating Rule 12(b)(6) motions, and a court's reference to such matters does not convert a motion to dismiss into a motion for summary judgment") (citation omitted); *Slade v. Schneider*, 129 P.3d 465, 471, 212 Ariz. 176, 182 (Ariz. App. Div. 1 2006) ("Though no published cases interpret when the Commission makes the names, information and documents a matter of public record, we need not determine all of the Commission' s actions that would result in the names, information and documents no longer being confidential because we agree with the Commission that this occurs when the Commission files the information or documents with a public tribunal."); *Havens v. State of Ind.*, 793 F.2d 143, 145 (7th Cir. 1986) ("the information elicited during Milford's cross-examination was not confidential information because it was a matter of public record."); *Lopez v. Wal-Mart Stores, Inc.*, 2012 WL 929851, at *2 (N.D. Cal. 2012) ("Only after Lopez pointed out that the consent decree was public did Wal–Mart withdraw the designation. In other cases, too, Lopez has been able to locate Wal–Mart's policies in public record and again after pointing it out, caused Wal-Mart to withdraw its "confidential" designation of documents.").

[19] Defendants also argue that "a 45-page legislative bill cannot be used to interpret a two-page initiative bill." Opposition at 9-11. Fair Share notes that the length of SB 129 is due to the legislative drafting format of including the language of the entire statutory section whenever there is even a minor change (which is not required and impracticable for initiatives), and it only contains roughly five pages of actual new text, with the transparency issue addressed in the first two sections. *See* Exhibit J attached to Motion, SB 129 at 1-2.

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III. Conclusion.

There are no genuine issues of material fact in this dispute, Fair Share is entitled to summary judgment as a matter of law, and Defendants are not. Defendant Meyer's extraneous, interpretative opinion that, "the normal Public Records Act process would apply" is neither true nor impartial and should be removed from the ballot summary, as were the other problems listed in Fair Share's Complaint. This final correction would leave any arguments regarding the interpretation of the initiative to a post-enactment determination rather than in the ballot summary where they do not belong.

Fair Share timely appealed the mischaracterization of Section 7 in the Summary along with the other issues that Defendants have conceded in the Amended Summary. Defendants' Amended Summary continues to mischaracterize Section 7 and does not pretend to resolve the issue raised in Fair Share's Complaint. The characterization of Section 7 remains squarely before this Court and should be substantively addressed and resolved. The Alaska Supreme Court recently affirmed a superior court order that "[t]he Alaska Constitution gives the voters great power to act independently of their elected officials" and "[i]nitiative and referendum powers allow the public to legislate and veto laws regardless of what the Legislature and Governor may say or want."[20] This Court should protect the constitutional independence of the Fair Share Act's sponsors and the voters of Alaska by striking Defendant Meyer's interpretive sentence from the ballot summary.

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[20] *Dunleavy v. State*, 2020 WL 2115477 at *3, 9 (2020) (*affirmed by State Division of Elections v. Recall Dunleavy*, Sup. Ct. No. S-17706, Order of May 8, 2020).

RESPECTFULLY SUBMITTED this 22nd day of May, 2020.

BRENA, BELL & WALKER, P.C.
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Certificate of Service
I hereby certify that a true and correct copy of the foregoing document was served by e-mail upon the following this 22nd day of May, 2020.

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Why is knowing the revenues, costs, and profits of our producers by field important for Alaskans?

Alaskans own the oil. As an owner state, Alaskans are in a business partnership with our producers to explore for, develop, and sell our oil. Only one of our producers has an obligation to make public its financial performance in Alaska, and that producer does not break out its performance by field. The existing law simply does not allow us to know how our producer partners are doing in each of our major legacy fields.

Instead of making public the revenues, costs, and profits for the producers for each of the major legacy fields, Alaskans are provided with selective, partial, and often misleading information. To have the very best oil resource policies and to ensure we are recovering the maximum benefit from our oil, it is essential that Alaskans have reliable and accurate information.

The Fair Share Act requires producers to report the revenues, costs, and profits for each of the major legacy fields.

How can I learn more or help?

You can learn more by checking in from time to time on our webpag eon our Facebook page. We post articles, substantive materials, and comments regularly there.

You can volunteer to help Vote Yes for Alaska's Fair Share on our volunteer page of our webpage at https://www.voteyesforalaskasfairshare.com/volunteer or on our Facebook page at https://www.facebook.com/voteyesforalaskasfairshare/.

You can donate to Vote Yes for Alaska's Fair Share, a nonprofit organization, on our donation page of our webpage at https://www.voteyesforalaskasfairshare.com/donate.

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Date: 5/22/2020 1:16:34 PM

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

FILED in the TRIAL COURTS
STATE OF ALASKA, THIRD DISTRICT

MAY 22 2020

Clerk of the Trial Courts
By _____ Deputy

VOTE YES FOR ALASKA'S FAIR SHARE, Plaintiff, v. KEVIN MEYER, LIEUTENANT GOVERNOR OF THE STATE OF ALASKA, and STATE OF ALASKA, DIVISION OF ELECTIONS, Defendants.	Case No. 3AN-19-11106 CI

DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The burden lies on the plaintiff, Vote Yes for Alaska's Fair Share (sponsors), to prove that the ballot summary is somehow misleading or biased.[1] If "reasonable minds may differ," the ballot summary is upheld.[2] Sponsors have not overcome their burden to show that reference to the Public Records Act process in the summary does not meet the statutory requirements of accuracy and impartiality. Sponsors' irrelevant arguments over unsubstantiated motivations or how the law may be implemented have no place in this lawsuit. The burden was also on sponsors to challenge the ballot summary within 30 days of the lieutenant governor's determination. Sponsors also failed to meet this

[1] *Planned Parenthood of Alaska v. State*, 232 P.3d 725, 729 (Alaska 2010).

[2] *Burgess v. Alaska Lieutenant Governor Terry Miller*, 654 P.2d 273, 276 n.7 (Alaska 1982) (internal citations omitted).

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burden. For these reasons, sponsors' lawsuit should be dismissed and summary judgment granted in favor of the State.

II. ARGUMENT

A. Sponsors cannot ignore statutory deadlines by preemptively filing an action against a ballot summary that did not yet exist; the ballot summary is a separate legal requirement and must be challenged within 30 days.

In what can only be an attempt to confuse the Court with word play, sponsors change the terminology they use in their opposition from "First Summary" and "Second Summary" to "First Summary" and "Amended Summary." Plaintiff's Opposition to Defendants' Motion for Summary Judgment (Pl. Opp.) at 3. These terms are legally meaningless. The lieutenant governor does not "amend" summaries as sponsors seem to assert. Instead, the lieutenant governor adheres to the two legal requirements in statute: the creation of a petition summary and a ballot summary.[3] Often, those summaries will end up being the same, but there is no legal requirement mandating identical summaries. Once the lieutenant governor issues the final petition summary or ballot summary, the lieutenant governor's duty is complete and the timeline for challenging the lieutenant governor's decision begins to run.[4]

In this case, sponsors received notice of the lieutenant governor's decision on the ballot summary on March 17, 2020, and the letter to sponsors expressly put them on notice of the 30 day timeline: "any person aggrieved by my determination set out in this

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[3] AS 15.45.090(a)(2), 15.45.180(a).

[4] AS 15.45.240.

letter [that included the ballot summary] may bring an action in the superior court to have the determination reversed within 30 days of the date on which notice of the determination was given." Defendants' Memorandum in Support of Motion for Summary Judgment (Def. MSJ), Exhibit 2 at 2. Sponsors failed to adhere to the 30-day requirement, and the challenge is time-barred.

Sponsors characterize this argument as "procedurally coy," but make no effort to discuss the case law on the strict adherence to election timelines addressed in the State's Memorandum in Support of Summary Judgment. Pl. Opp. at 3. Important public policy reasons weigh in favor of strict adherence to election timelines in order to properly prepare for an election and inform the public of what is going to be on the ballot.[5] If, for example, a group opposed to the initiative chose to challenge the ballot summary instead of the sponsors, presumably the sponsors would want that group to strictly adhere to timelines to get information to the public as quickly as possible. The same rules apply to all parties.

The fact that sponsors challenged the petition summary in this case does not make a difference. The statutory requirements for bringing a challenge must be met. Also in this case, the ballot summary differed from the petition summary, and there was no way for the State to know for certain that sponsors disagreed with the ballot

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[5] *Falke v. State*, 717 P.2d 369, 373-74 (Alaska 1986).

summary without sponsors taking some affirmative action.[6] Rather than amending its complaint, filing a new complaint, or even just filing its motion for summary judgment within the 30 day timeframe, the State only found out sponsors' intent to challenge the ballot summary by reaching out in advance of the status conference after the 30 days had already expired. Def. MSJ, Affidavit of Cori M. Mills at ¶4. By taking no steps to notify the State or the Court of its challenge to the ballot summary, this lawsuit is untimely and should be dismissed.

Sponsors' characterization of the ballot summary as the lieutenant governor "conceding" to sponsors' request for changes or as the "amended summary" do not change the legal requirements. Pl. Opp. at 3, 5. Similarly, whether the State planned on using the same summary or not is irrelevant to the question of timeliness. Pl. Opp. at 4. Sponsors point to unsubstantiated motivations in an attempt to get around the applicable statute of limitations and declare in one unsupported sentence without further briefing that equitable estoppel applies. Pl. Opp. at 6.[7] It does not matter what reason the State

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[6] Although sponsors challenged the petition summary, sponsors' prayer for relief only discussed the ballot summary—seemingly seeking to have the Court write the ballot summary before the duty to draft a ballot summary existed. This relief could not have been granted even if the Court had found the petition summary to be faulty. Sponsors wanted the Court to leave the petition summary alone. This is why the State has characterized the original complaint as moot—the petition has already been certified for the ballot and sponsors' prayer for relief was improper at the time the complaint was filed. See Plaintiff's Complaint.

[7] Sponsors' failure to brief this issue is fatal and the issue cannot be considered. Regardless, sponsors insert throw away citations to Ninth Circuit case law, instead of analyzing Alaska case law that is readily available on estoppel and goes against their assertion. *See Allen v. State, Dep't of Health & Soc. Servs., Div. of Pub. Assistance*, 203 P.3d 1155, 1164 (Alaska 2009).

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had for changing the summary or what the Attorney General Opinion said—the fact is that the ballot summary differs from the petition summary, it is a separate legal requirement, and it has to be challenged in 30 days. That did not happen.

B. The ballot summary merely confirms that public records are requested and disclosed under the requirements of the Public Records Act.

Sponsors ask the Court to read into the ballot summary words that are not there in order to find that it is somehow misleading or biased. But the ballot summary simply affirms the procedural requirements that would apply to state agencies if the initiative were enacted. The sentence—"This means the normal Public Records Act process would apply"—makes no conclusions about how and whether the exceptions to the Public Records Act would apply. Under existing law, a provision in the Public Records Act makes all tax records "not a matter of public record;" in other words, they are confidential and are not subject to the Public Records Act.[8] By removing the exemption and making the tax records "a matter of public record," members of the public can now request the records and state agencies are mandated by statute and regulation to respond to the request in a timely manner and disclose the records, unless an exception applies.[9] Any denial of disclosure is subject to an administrative or court appeal, and the court

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[8] AS 40.25.100.

[9] AS 40.25.110-.125; 2 AAC 96. An exception differs from an exemption. An exception means that certain information can be redacted but the regulations require that the reason for redaction be provided and that decision can be appealed. An exemption means the record is not subject to the Public Records Act and will remain confidential. A state agency is under no obligation to provide a response and cannot be sued for failure to disclose the record under the act because the act does not apply.

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can issue an injunction.[10]

Sponsors' fear that portions of the tax records may be withheld under one of the exceptions is an argument for another day. If the initiative is enacted, the Department of Revenue would be under a mandatory duty to respond to any request for the tax records, conduct a review of those records, and provide the records in compliance with the Public Records Act. If the department determined parts of the records were not subject to disclosure for either statutory or constitutional reasons, that determination could be appealed following the process outlined in the Public Records Act. At that point, a court could determine whether any of the exceptions applies, or whether the records must be disclosed in their entirety. None of that is presented in the ballot summary, and because it is not in the ballot summary, it is irrelevant to a determination of whether the ballot summary is accurate and impartial.

Sponsors argue that the language in the initiative bill not only implicitly amends the exemption making tax records confidential but also overrides the entire Public Records Act process. Pl. Opp. at 12. To support this interpretation, sponsors point to cases and statutes concluding that certain records must be fully disclosed. Pl. Opp. at 8, fn. 15. As an initial matter, if the Court agrees with this interpretation, then not only would the ballot summary be inaccurate but so would the petition summary. This would call into question the signatures gathered in support of the petition because of potential

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[10] AS 40.25.125.

petition signer inadvertence.[11] The State's position is that both the petition summary's and the ballot summary's reference to the Public Records Act is an accurate portrayal of the changes made by the initiative bill. But if that position were to be found incorrect, it would apply equally to the petition summary and the ballot summary.

Moreover, sponsors offer no explanation as to how, if the Public Records Act process does not apply, the new tax records would be disclosed. The cases and statutes cited are inapposite of the question on process and what requirements apply to state agencies. The "notwithstanding" clause in the initiative bill cannot be read to, by inference, overcome what is an otherwise statutorily required process for the disclosure of records. The initiative bill needed to specifically exempt the records from the process if that is what it meant to do. Otherwise, the Public Records Act sets forth the requirements for public records, and as the initiative bill states, these tax records would now be "a matter of public record" instead of confidential and exempt from public record status. Stating the Public Records Act process would apply is an accurate summary of Section 7 of the initiative bill.

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[11] In *Planned Parenthood of Alaska v. Campbell*, the Alaska Supreme Court had to grapple with what to do when a petition summary was found to be misleading or biased after the petition had already been submitted and certified. The Court set forth the following balancing test to determine whether petition-signer inadvertence should require the petition to be recirculated: "the nature and magnitude of the misleading statement or omission, the likelihood and extent of petition-signer inadvertence, the hardship to initiative sponsors that invalidating signatures would cause, and the hardship to the initiative's opponents that permitting the initiative to go forward would cause." 232 P.3d at 733-734.

III. CONCLUSION

The lieutenant governor has met all the necessary statutory requirements of drafting a neutral ballot summary and sending notification to the sponsors, which triggers the 30 day timeline to challenge the lieutenant governor's decision. Sponsors could have easily amended their complaint, filed a new complaint, or at the least, filed a dispositive motion within the 30 day timeframe. But they did not. Sponsors also have not shown that voters will somehow be misled about the main features of 19OGTX by including a commonsense description of how the status of tax records will change from being confidential to being treated as any other public records in the State. For these reasons, summary judgment should be granted in favor of the State.

DATED May 22, 2020.

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

VOTE YES FOR ALASKA'S FAIR SHARE, Plaintiff, v. KEVIN MEYER, LIEUTENANT GOVERNOR OF THE STATE OF ALASKA, and STATE OF ALASKA, DIVISION OF ELECTIONS, Defendants.	)	Case No. 3AN-19-11106CI

ORDER

Plaintiff's Motion for Summary Judgment
Defendants' Motion for Summary Judgment

Introduction.

Vote Yes for Alaska's Fair Share (Vote Yes) proposed an initiative to revamp certain aspects of the State's taxation scheme applicable to a defined set of oil producers. Lieutenant Governor Kevin Meyer prepared a summary of the initiative to be included with the petition for the initiative. Vote Yes filed a lawsuit objecting to three aspects of the petition summary. Meyer later concluded that Vote Yes had gathered sufficient signatures to place the initiative on the ballot. Meyer prepared a different summary of the initiative for the ballot. Vote Yes now only objects to one part of the ballot summary. Both parties have filed motions for summary judgment.

The Court finds that Vote Yes filed a timely objection to the ballot summary and that Meyer's description of the impact of section 7 of the initiative is not impartial. Thus a single sentence of the ballot summary should be stricken.

Chronology

Vote Yes filed its initiative petition on 19 August 2019. Pursuant to the authority given to the lieutenant governor by AS 15.25.010-15.45.220 Meyer certified the petition for circulation on 15 October 2019. He provided a summary of the initiative to be included with the petition. The Department of Law crafted that summary. On 14 November 2019 Vote Yes filed its complaint objecting to three aspects of the petition summary, including the description of the effect of section 7 of the initiative.[1] Nonetheless, Vote Yes circulated the petition and gathered signatures.

On 17 March 2020 Meyer certified that Vote Yes had gathered the requisite signatures and that the initiative could be placed on the ballot.[2] Meyer issued a ballot summary that differed somewhat from the petition summary, changing two assertions in the first summary that had prompted objections in the

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[1] Complaint (14 November 2019) at 10-11, ¶¶ 29-31 (objection to summary of section 7).

[2] Memorandum in Support of Plaintiff's Motion for Summary Judgment (Vote Yes Memo.) (1 May 2020), Exhibit D (Letter from Lt. Gov. Kevin Meyer to Robin O. Brena (17 March 2020)).

Vote Yes lawsuit. The ballot summary included a description of the initiative's section 7 that differed from the description in the petition summary.

In the pending litigation Vote Yes did not renew or amend its objection to address the new summary of section 7. Nor did it withdraw the initial objection. Instead it proceeded with the lawsuit it had already filed. On 20 April 2020, during a scheduling discussion, Vote Yes advised the assistant attorney general assigned to the litigation that it was going forward with its challenge to the ballot summary's description of section 7.[3]

Timeliness.

Meyer contends that Vote Yes did not make a timely objection to the new description of the effect of section 7 contained in the ballot summary and thus the complaint should be dismissed. Any person who is "aggrieved by a determination made by the lieutenant governor under AS 15.45.010-15.45.220 may bring an action in the superior court to have the determination reviewd[.]"[4] The action must be filed "within 30 days of the date on which notice of the determination was given."[5] Meyer argues that Vote Yes may not pursue its challenge to the ballot summary because it did not amend its complaint to include a challenge to the ballot summary. The existing lawsuit only challenged the

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3 Affidavit of Cori M. Mills (1 May 2020) at 2, ¶ 4.

4 AS 15.45.240.

5 *Id.*

petition summary. Meyer reasons that the earlier challenge could not apply to a ballot summary that did not exist when the complaint was filed. Furthermore, the ballot summary's description of section 7 differs from the description in the petition summary, thus Vote Yes might not necessarily object to the new description. Meyer argues that Vote Yes was obligated to assert an objection specific to the ballot summary within 30 days of its issuance and could not rely upon the pre- existing objection to the petition summary. Meyer points outs that the verbal confirmation, made on 20 April 2020, that Vote Yes was pursuing an objection to the ballot summary, was 3 days after the 30 day filing period had elapsed. As a result Meyer contends that Vote Yes should be barred from pursuing its objection in this litigation.

In order to evaluate Meyer's untimeliness argument it is necessary to review the substance of the relevant portions of the initiative, the two summaries of section 7, and the Vote Yes complaint. Did the Vote Yes complaint, although based upon the petition summary, give Meyer adequate notice of its objection to the description of section 7 in the subsequent ballot summary?

Section 1 of the initiative provides:

> The uncodified law of the State of Alaska is amended by adding a new section to read:
>
> SHORT TITLE. This Act shall be known as the "Fair Share Act."

Notwithstanding Any Other Statutory Provisions to the Contrary, the Oil and Gas Production Tax in AS 43.55 Shall be Amended As Follows:[6]

Section 7 of the initiative provides: "**Public Records**. All filings and supporting information provided by each producer to the Department relating to the calculation and payment of the taxes set forth in Sections 3 and 4 shall be a matter of public record."[7]

On 14 October 2019 the Department of Law issued a letter to Meyer describing what the initiative proposed to do and concluding that the application met the requirements for an initiative.[8] The letter also included what it described to be "a ballot-ready petition title and summary to assist you in complying with AS 15.45.090(2) and AS 15.45.180, as is our office's standard practice. Under AS 15.45.180 a ballot proposition must include a 'true and impartial summary of the proposed law.'"[9] On 15 October 2019 Meyer certified the initiative application and provided Vote Yes with a copy of the Department of Law letter.[10]

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6 Complaint, Exhibit A at 1.

7 Complaint, Exhibit A at 2.

8 Complaint (14 November 2019), Exhibit B (Letter from Assistant Attorney General Cori Mills to Lieutenant Governor Kevin Meyer (Mills Letter) (14 October 2019) at 11.

9 Mills Letter at 11.

10 Answer (10 February 2020) at 3, ¶ 12.

The Department of Law advised Meyer that section 7 of the initiative stated that filings to the Department of Revenue from producers subject to the new tax would be "a matter of public record."[11] The Department of Law explained the limited significance of this.

> Although this could raise concerns over the constitutional right to privacy, the reality is that most of the tax documents would still likely be protected from disclosure. This is because making the tax documents "a matter of public record" simply means the Public Records Act applies, instead of being exempted from it.[12]

In its lawsuit Vote Yes objected to this description of section 7.[13] It alleged that section 7 was intended not merely to make the filings a matter of public record, but also to make them not confidential.[14] Vote Yes asserted that "[i]f a document is a matter of public record, confidentiality restrictions do not apply."[15]

Vote Yes argued that the Department of Law's summary was the exact opposite of the true intention of the sponsors of the initiative. It demanded that the summary be corrected. Alternatively, if the ballot summary was not corrected to state that the producers' filings would be open to the public, then Vote

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11 Mills Letter at 6.

12 *Id.*

13 Complaint at 9-11, ¶¶ 26-31.

14 *Id.* at 9-10, ¶ 27.

15 *Id.* at 10, ¶ 27.

Yes proposed that the meaning of "a matter of public record" be litigated after the initiative passed. To that end Vote Fair proposed that the summary merely state that the filings would be "a matter of public record" without defining that term or making any reference to the Public Records Act.[16]

On 17 March 2020 Meyer certified the petition for the ballot. He provided a revised summary of the initiative. The language he used to explain the effect of section 7 differed from that of the Department of Law. But the gist of the explanation remained the same and continued to differ from that of the sponsors. Meyer explained:

> The act would also make all filings and supporting documents "a matter of public record." This would mean the normal Public Records Act process would apply.[17]

At a minimum this explanation rejects the sponsors' assertion that section 7 meant that the filings would always be available to the public. The explanation means that the statutory exceptions to disclosure of public records would remain available to deprive the public of access to the filings.[18]

The Court finds that the notice that Vote Yes gave of its objection to the first summary of section 7 provided the lieutenant governor and the

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[16] *Id.* at 11, ¶ 31.

[17] Vote Yes Memo., Exhibit D at 2.

[18] *See* AS 40.25.120 (exceptions to disclosure of public records).

Department of Law with timely notice that Vote Yes would continue to object to any limitation on its desired full public disclosure of the producers' filings. By not merely objecting, but actually filing a lawsuit, Vote Yes signaled that it was willing to spend the resources to pursue its objections.

The content in the complaint of the objection to the first (petition) summary was sufficiently detailed to place all interested parties on notice that Vote Yes would not be satisfied by the lieutenant governor's assertion in the second (ballot) summary that the Public Records Act remained applicable. The ballot summary clearly meant that the lieutenant governor was rejecting Vote Yes's assertion that section 7 intended that all of the defined filings were not confidential. The assertion that the Public Records Act applied would mean the statutory exceptions to disclosure could be triggered. Vote Yes clearly voiced its objections to any restriction on public access to the filings.

Presumably the short time period for the filing of a lawsuit was intended, in part, to enable all interested parties to resolve issues about the adequacy of the ballot summary rapidly in order to meet practical timeline requirements for the preparation of election materials. The failure of Vote Yes to reassert its objection did not have any impact on the ability of the parties to obtain speedy judicial resolution of the objection. To the contrary, on 11 February 2020 the Court had issued a pretrial order. The parties had consulted by 26 February

2020 and were discussing procedural options.[19] On 16 April 2020 the Court set a status hearing for 22 April 2020. At that hearing the Court set a briefing schedule and set oral argument on the two motions for summary judgment for 26 May 2020. Thus there was no delay caused by the 3 day period between 17 April when the lawsuit would have been required in response to the second summary issued on 17 March 2020 and 20 April 2020 when counsel for the parties spoke and Vote Yes confirmed it was pursuing the lawsuit.

Nor was there any substantive change in the position that Alaska Yes took after learning of the ballot summary from the position it had articulated in the complaint. The lieutenant governor suffered no prejudice by any delay. At oral argument counsel for the lieutenant governor acknowledged that if Alaska Yes had merely said (before 17 April 2020) that it still objected to the second summary of section 7 for the same reasons stated before, that would have been adequate notice.

Given the chronology of the interactions of Alaska Yes, the lieutenant governor, and the Department of Law, the defendants had sufficient and timely notice of the continuing objections to section 7. The notice of the objections contained in the complaint was adequate notice even though the ballot summary had not yet been issued. There was insufficient (if any) substantive change between the two summaries to necessitate a new notice or any amendment to the complaint. The defendants also understood on 17 April 2020 that Alaska Yes had

[19] Notice on Meet and Confer (26 February 2020).

not dropped its lawsuit and thus had to understand that Vote Yes was pursuing the objections previously articulated.

Thus the Court finds that there was satisfactory and timely notice to the defendants. The request to grant summary judgment on behalf of the defendants on that basis is DENIED.

Impartiality of the Summary.

After certification of the application of an initiative, the lieutenant governor is required to provide a summary of its subject matter.[20] If the petition is "properly filed," the lieutenant governor is to prepare "a ballot title and proposition."[21] The proposition is to be "a true and impartial summary of the proposed law."[22]

The Alaska Supreme Court addressed the criteria for ballot summaries and the role of a reviewing court in *Planned Parenthood of Alaska v. Campbell*.[23] It explained:

> Although we hold petition summaries and ballot summaries to the same standards for accuracy and impartiality, there are important differences between the functions served by initiative petition summaries and ballot summaries. … "[T]he basic purpose of

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20 Alaska Const. Article XI. Section 3.

21 AS 15.45.180(a).

22 *Id.*

23 232 P.3d 725 (Alaska 2010).

> the ballot summary," on the other hand, "is to enable voters to reach informed and intelligent decisions on how to cast their ballots—decisions free from any partisan suasion."[24]

The trial court is to "give deference to the lieutenant governor's summary itself; in reviewing the adequacy of a lieutenant governor's ballot summary [the trial court should] apply a deferential standard of review."[25]

This Court's evaluation of Meyer's ballot summary is also informed by the prudential preference to withhold interpreting the substantive content of the initiative unless and until it is has been approved by the electorate. Thus

> when initiative petitions meet formal requirements for filing, the laws they propose to adopt are ordinarily not subject to immediate challenge: "The general rule is that a court should not determine the constitutionality of an initiative unless and until it is enacted." The rule against pre-election review is a prudential one, steeped in traditional policies recognizing the need to avoid unnecessary litigation, to uphold the people's right to initiate laws directly, and to check the power of individual officials to keep the electorate's voice from being heard.[26]

The parties dispute the meaning of the phrase "a matter of public record" as contained in section 7. Vote Yes argues the intent is to give the public

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[24] *Id.* at 729-30 (footnote omitted) (quoting *Alaskans for Efficient Government, Inc. v. State*, 52 P.3d 732, 735 (Alaska 2002) (quoting *Burgess v. Alaska Lieutenant Governor*, 654 P.2d 273, 275 (Alaska 1962).

[25] *Id.* at 729 (footnote and quotation marks omitted) (quoting *Alaskans for Efficient Government*, 52 P.3d at 735) (quoting *Burgess*, 654 P.2d at 276).

[26] *Alaskans for Efficient Government, Inc. v. State*, 153 P.3d 296, 298 (Alaska 2007) (quoting *State v. Trust the People*, 113 P.3d 613, 614 n. 1 (Alaska 2005) (footnote omitted).

access to documents filed by the producers that will enable the public to better understand the financial condition of the producers and the impact of tax policies. It argues that the phrase has meant that documents and information that are "a matter of public record) are, by definition, not confidential. Vote Yes points to three examples of the use of that phrase in Alaskan statutes.[27]

The Alaska Surface Coal Mining Control and Reclamation Act[28] governs various aspects of coal mining. Entities that seek to engage in coal mining must obtain a permit from the commissioner of natural resources.[29] The public's access to the information contained in an application for a permit is addressed in AS 27.21.110. Some information is available to the pubic; other information is confidential. The distinction between the two types if information is provided in subsection (c)(1). It provides:

> (c) Information
>
> (1) gathered from the proposed permit area included in the application for a permit and pertaining to coal seams, test borings, core samplings, or soil samples must be made available to any person with an interest that is or may be adversely affected, except

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[27] Vote Yes also points to examples of that usage in cases from other jurisdictions. *See* Opposition to Defendants' Motion for Summary Judgment (15 May 2020) at 8, n. 15.

[28] AS 27.21.010-27.21.999.

[29] AS 27.21.060.

> that information that relates only to the analysis of the chemical and physical properties of the coal, other than information regarding the mineral or elemental content that is potentially toxic in the environment, must be kept confidential *and not made a matter of public record*[.][30]

Entities seeking financing from the Alaska Industrial Development and Export Authority must provide it with a wide variety of information. Some, but not all of the information supplied is confidential. AS 44.85.215 draws that distinction.

> a) In order to promote the purposes of this chapter, unless the records or information were *a matter of public record* before submittal to the authority, the following records and information shall be kept confidential if the person supplying the records or information or the project, bond, loan, or guarantee applicant or borrower requests confidentiality and makes an adequate showing to the executive director of the authority that the records or information are [listing (1) – (8).][31]

A third example of the use of the phrase "a matter of public record" is found in AS 39.90.010(a). It provides: "(a) A public employee may not be dismissed, demoted, suspended, laid off, or otherwise made subject to any disciplinary action for communicating *matters of public record* or information under AS 40.25.110 and 40.25.120."[32]

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30 Italics supplied.

31 Italics supplied.

32 Italics supplied.

In each of these examples confidential information is contrasted with information that is a "matter of public record." The Court agrees with Vote Yes that the phrase "a matter of public interest" is often used as shorthand to mean information or documents are not be kept confidential but will be available for public inspection.

Meyer points to a more nuanced use of the term in the statute that addressed public records in general[33] and tax records in particular. AS 40.25.100(a) provides, in part:

> (a) Information in the possession of the Department of Revenue that discloses the particulars of the business or affairs of a taxpayer or other person, including information under AS 38.05.020(b)(11) that is subject to a confidentiality agreement under AS 38.05.020(b)(12), is *not a matter of public record*, except as provided in AS 43.05.230(i)--(*l*) or for purposes of investigation and law enforcement. The information shall be kept confidential except when its production is required in an official investigation, administrative adjudication under AS 43.05.405--43.05.499, or court proceeding.[34]

This statute is another example of the contrast between "A matter of public record" and confidentiality. Vote Yes contends that section 7 would negate this provision for documents and information provided by producers subject to the initiative. They would no longer be confidential.

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[33] *See* AS 40.25.100-40.25.350.

[34] Italics supplied. *See also* 43.05.230 (prohibiting state employees from disclosing tax records).

Meyer, however, contends that while the producers' information would now be "a matter of public record," and thus presumptively available to the public,[35] the producers could still assert statutory exceptions to public access and thus records would remain confidential.[36] Not all information or documents that are public records are available to the public.

The Court is not authorized to resolve this dispute over the meaning of section 7. While it is true that this dispute is not about the constitutionality of the initiative, and thus the prohibition described in *Alaskans for Efficient Government* is not triggered, the preference against construing the meaning of an initiative until and unless it is approved by the electorate remains.

What the Court is required to do at this stage is to determine whether Meyer's ballot summary is "a true and impartial summary of the proposed law,"[37] "free from any partisan suasion."[38]

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35 AS 40.25.110(a) provides, in part: "(a) Unless specifically provided otherwise, the public records of all public agencies are open to inspection by the public under reasonable rules during regular office hours."

36 AS 40.25.120 (listing 18 categorical exceptions to public access to public records).

37 AS 15.45.180(a).

38 *Planned Parenthood of Alaska,* 232 P.3d at 729-30 (footnote omitted) (quoting *Alaskans for Efficient Government, Inc. v. State*, 52 P.3d 732, 735 (Alaska 2002) (quoting *Burgess v. Alaska Lieutenant Governor*, 654 P.2d 273, 275 (Alaska 1962).

By telling the public that section 7 would not only make all filings and supporting documents "a matter of public record," but also that "[t]his would mean the normal Public Records Act process would apply[,]"[39] Meyer weighs in on the dispute over the meaning of section 7. He does not reveal that there is a dispute over the meaning of "a matter of public record." He does not indicate that it is unclear whether the exceptions to disclosure of public records, contained in AS 40.25.120, might apply to some of the producers' filings. Instead, he places his finger on the scales and affirmatively states that section 7 does not mean or accomplish what its sponsors say was their intent or would be the effect of the initiative.

This affirmative resolution of the dispute over its meaning is not an impartial summary of section 7. By siding with the possibility of confidentiality Meyer has engaged in partisan suasion. That is improper.

Meyer argues that the simple statement that 'the normal Public Records Act process would apply" does no more than inform the public how to go about gaining access to the filings. He seems to argue that he has not expressly taken a position on whether any of the filings can remain confidential. That cuts too fine a distinction. Vote Yes is not disputing the logistics of how a member of the public would seek access to documents. There was no disagreement about to what state agency should a member of the public send her request. The dispute is

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[39] Vote Yes Memo., Exhibit D at 2.

over whether the filings would always be accessible to the public, as Vote Yes contends, or whether some filings would remain confidential, as the Department of Law initially advised.

The initiative never mentions that Public Records Act. The most impartial resolution of the meaning of section 7 and the impact it would have on public access to the producers' filings is to say nothing about the Public Records Act. Let the public decide whether it favors what Vote Yes claims its initiative is intended to achieve. Vote Yes wants more transparency in the State's taxation regime as it applies to producers covered by the initiative. If the initiative passes, then the disputes about what the language of the initiative actually accomplishes can be litigated. For now the most important goal is to allow Vote Yes to present its vision of taxation and transparency to the voters. It may be that the initiative's language is not sufficiently precise to achieve all of the sponsors' intended results. But the voters should be permitted to voice their opinions of the sponsors' intentions without Meyer opining that the initiative does not achieve to the level of transparency that the sponsors' seek through section 7. While the Court is to grant deference to Meyer's ballot summary, it should not do that if deference would result in a summary that is not impartial.

Plaintiff shall delete from the ballot summary the sentence "This would mean the normal Public Records Act process would apply."

Plaintiff's Motion for Summary Judgment is GRANTED.

Defendants' Motion for Summary Judgment is DENIED.

DONE this 8th day of June 2020, at Anchorage, Alaska.

William F. Morse
Superior Court Judge

I certify that on 9 June 2020
a copy of the above was emailed to
the following:

R. Brena
C. Mills

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Subject: 3AN-19-11106CI - Mtn for Amending Findings; Clarification, Mtn for Expedited Consideration, and
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

VOTE YES FOR ALASKA'S FAIR SHARE, Plaintiff, v. KEVIN MEYER, LIEUTENANT GOVERNOR OF THE STATE OF ALASKA, and STATE OF ALASKA, DIVISION OF ELECTIONS, Defendants.	FILED in the TRIAL COURTS STATE OF ALASKA, THIRD DISTRICT JUN 12 2020 Clerk of the Trial Courts By _____ Deputy Case No. 3AN-19-11106 CI

(5) **MOTION AND SUPPORTING MEMORANDUM TO MAKE ADDITIONAL FINDINGS AND AMEND ORDER PURSUANT TO CIVIL RULE 52(b); ALTERNATIVELY, MOTION FOR CLARIFICATION OF ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT AND SUBMISSION OF REVISED BALLOT SUMMARY**

In the Court's order dated June 9, 2020 granting the plaintiff's Motion for Summary Judgment, the Court ordered Defendant Lieutenant Governor Meyer to strike the last sentence in the ballot summary, which states: "This means the normal Public Records Act process would apply."[1] The Court reasoned that the sentence "weighs in on the meaning of section 7" and therefore is not impartial.[2] Although the Court struck this last sentence, it did not foreclose the Lieutenant Governor from making further changes to better conform to the Court's order while also ensuring that voters have a full,

[1] Id. at 17.

[2] Id. at 16.

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accurate, and impartial summary that does not weigh in on the dispute over the meaning of section 7 one way or the other.

In order to provide a full and accurate summary of the bill while adhering to the clear import of the court's order, the Lieutenant Governor proposes replacing the stricken sentence with another: "The act does not specify the process for disclosure of the public records and whether any exceptions may apply." Adding this sentence will fill an information void that, if left uncorrected, is misleading to voters. This revision seeks to inform the voters and conform to the Court's holding that the interpretation of Section 7 is unclear and would have to be resolved post-enactment. The Court indicated that the issue with the affirmative mention of the Public Records Act process was that it provided an interpretation or at least could lead voters in a specific direction regarding the interpretation.

Without this additional sentence, removing the sentence stating that "the normal Public Records Act process would apply" moves the "finger on the scales" to add weight in the other direction. Striking "the normal Public Records Act process would apply" language from the summary, without more, creates a critical information vacuum. Specifically, it will fail to inform voters that the bill does not specify the extent to which making these records "a matter of public record" changes existing law. Potentially, the voters will have only the interpretation provided by the sponsor or opposition statement in the election pamphlet that *no* exception to public disclosure applies, even constitutionally required exceptions such as privacy or due process. Omitting an explanation of the provision's ambiguity from the ballot summary would

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not serve the summary's purpose—"to enable voters to reach informed and intelligent decisions on how to cast their ballots—decisions free from any partisan suasion."[3] On the contrary, it could lead voters to a false understanding of what the initiative could do.

For these reasons, the Lieutenant Governor submits a revised ballot summary for the Court's consideration. The Lieutenant Governor is not asking the Court to reconsider the substance of its original order; he asks the Court only to consider alternative language as a way to timely resolve these issues. This request is made pursuant to Civil Rule 52(b), which allows the Court to "amend its findings or make additional findings." Alternatively, the request is filed as a motion for clarification, which the Court treats as a motion for reconsideration under Civil Rule 77(k).[4] The Lieutenant Governor asks the Court to clarify its order to allow him to make additional changes to the ballot summary, changes that both comply with the Court's order and inform the voters of the uncertainty surrounding the meaning of Section 7.

Striking the last sentence and replacing it with: "The act does not specify the process for disclosure of the public records and whether any exceptions may apply" would produce the following ballot summary:

> **An Act changing the oil and gas production tax for certain fields, units, and nonunitized reservoirs on the North Slope**
>
> This act would change the oil and gas production tax for areas of the North Slope where a company produced more than 40,000 barrels of oil per day in the prior year and more than 400 million barrels total. The new areas would be divided up based on "fields, units, and nonunitized

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[3] *Planned Parenthood of Alaska v. Campbell*, 232 P.3d 725, 729-30 (Alaska 2010).

[4] *See Light v. Dionne*, 1991 WL 11657763 (Alaska Sept. 5, 1991) (unpublished).

reservoirs" that meet the production threshold. The act does not define these terms. For any areas that meet the production threshold, the tax would be the greater of one of two new taxes.

(1) One tax would be a tax on the gross value at the point of production of the oil at a rate of 10% when oil is less than $50 per-barrel. This tax would increase to a maximum of 15% when oil is $70 per-barrel or higher. No deductions could take the tax below the 10% to 15% floor.

(2) The other tax, termed an "additional tax," would be based on a calculation of a production tax value for the oil that would allow lease expenditure and transportation cost deductions. This tax on production tax valuc would be calculated based on the difference between the production tax value of the oil and $50. The difference between the two would be multiplied by the volume of oil, and then that amount would be multiplied by 15%. The existing per-taxable-barrel credit would not apply. The act uses the term "additional tax" but it does not specify what the new tax is in addition to.

The tax would be calculated for each field, unit, or nonunitized reservoir on a monthly basis. Taxes are currently calculated on an annual basis, with monthly estimated payments. Since these new taxes would only apply to certain areas, a taxpayer would still have to submit annual taxes for the areas where the new taxes do not apply.

The act would also make all filings and supporting information relating to the calculation and payment of the new taxes "a matter of public record." The act does not specify the process for disclosure of the public records and whether any exceptions may apply.

To avoid a future dispute over this change and to expedite resolution of the ballot summary issues, Defendants Lieutenant Governor Kevin Meyer and the Division of Elections request the Court consider this alternative language and make additional findings or specifically clarify its order to allow the Lieutenant Governor to replace the deleted sentence with a new sentence to better inform voters of the uncertainty surrounding the term "a matter of public record."

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DATED June 12, 2020.

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

VOTE YES FOR ALASKA'S FAIR SHARE, Plaintiff, v. KEVIN MEYER, LIEUTENANT GOVERNOR OF THE STATE OF ALASKA, and STATE OF ALASKA, DIVISION OF ELECTIONS, Defendants.	Case No. 3AN-19-11106 CI

(5)

FAIR SHARE'S OPPOSITION TO DEFENDANTS' MOTION TO MAKE ADDITIONAL FINDINGS AND AMEND ORDER OR ALTERNATIVELY FOR CLARIFICATION

Plaintiff Vote Yes for Alaska's Fair Share ("Fair Share"), by and through counsel, Brena, Bell & Walker, P.C., opposes Defendants' Motion to Make Additional Findings or for Clarification dated June 12, 2020 ("Motion"), as an improper procedural and substantive attempt to change its position after this Court has ruled.

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DISCUSSION

From the beginning, Fair Share has suggested to this Court the initiative process required its protection from state officials opposed to Fair Share presenting its vision to the Alaskan voters. Defendants apparently feel justified to continue to ignore the initiative sponsor's vision while they continue to search for a way to impose their vision of the initiative onto Alaskan voters. In their first summary of the Fair Share Act, Defendants made no effort to provide a true and impartial summary and refused to correct even obvious errors and clearly biased statements before Fair Share sought this Court's protection. Only after Fair Share sought the protection of this Court did Defendants strategically abandon much of their first summary.

In their second summary, Defendants continued to try to impose their vision of the transparency provision of the Fair Share Act onto Alaskan voters, but this Court rejected that effort in its Order.[1] This Court should also deny their third attempt on both procedural and substantive grounds.

Procedurally, after this Court has ruled and resolved every issue in this case is not an appropriate time to permit Defendants to change their position and introduce new ballot language for the third time. Defendants' Motion is not a proper request for reconsideration, clarification, or further findings. Defendants make no effort to meet the legal standards for this Court to reconsider its order, to clarify its order, or to add additional findings of fact. Defendants point to no error in law or fact. Defendants point to no issue requiring clarity.

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[1] Order re Plaintiff's Motion for Summary Judgment and Defendants' Motion for Summary Judgment (June 8, 2020) ("Order").

Defendants point to no matter before this Court that requires additional findings. Instead, Defendants want to change their position because they lost. After this Court has issued a final ruling resolving all issues is not an appropriate time to permit Defendants a third attempt to impose their vision of the transparency provision of the Fair Share Act onto Alaskan voters by introducing entirely new language to the ballot summary.

For whatever reason, Defendants do not accept this Court's core ruling to "Let the public decide whether it favors what Vote Yes claims its initiative is intended to achieve. . . . For now the most important goal is to allow Vote Yes to present its vision of taxation and transparency to the voters." Fair Share's vision of the transparency provision is the one stated in the Fair Share Act which is that, "All tax filings . . . shall be a matter of public record," period. Defendants continue to try to summarize Fair Share's vision to mean that some tax filings may become a matter of public record if the agency determines the exceptions under the normal Public Records process do not otherwise apply. Fair Share's vision is not Defendants' vision, and the summary on the ballot must truly and impartially reflect Fair Share's vision. The English language does not permit "all" to mean "some," "shall" to mean "may," or "a matter of public record" to mean "remain confidential under the exceptions in the normal Public Records process." Transparency is not for "some" tax filings under Fair Share's vision, but for "all" tax filings. Transparency is not subject to the discretion of the Department of Revenue under Fair Share's vision, but mandates the Department "shall" provide all tax filings to the public. Transparency is not subject to the normal Public Record "exceptions" under Fair Share's vision, because there are no exceptions possible when the language of the initiative

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states, "all tax filings . . . shall be a matter of public record." No matter how they attempt to impose their vision, it is still tipping the scales to their vision. It is simply not a true and fair summary of Fair Share's vision to allow Defendants to add in the elements of Defendants' vision while ignoring the actual language and clear intentions of Fair Share. As this Court observed, "If the initiative passes, then the disputes about what the language of the initiative actually accomplishes can be litigated."

A. Defendants Have No Basis to Propose Changes to This Court's Order.

A party may move for reconsideration of an order under Civil Rule 77(k)(1) if it believes the court has overlooked, misapplied, or failed to consider a statute, decision, or principle directly controlling; overlooked or misconceived some material fact or proposition of law; overlooked or misconceived a material question in the case; or if the law applied in the ruling has been subsequently changed by court decision or statute. Defendants have not done this. Instead, they declare that in granting summary judgment against them, this Court "did not foreclose the Lieutenant Governor from making further changes to better conform to the Court's order while also ensuring that voters have a full, accurate, and impartial summary that does not weigh in on the dispute over the meaning of Section 7 one way or the other."[2] Fair Share does not accept this description of Defendants' "further changes," but, on the procedural level, it does not accept their ability to make them. This Court has ordered what the language of the ballot summary is to be. Defendants may continue to prefer a different summary and

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[2] Motion at 1-2.

regard their new version as "better" than the Court's, but they provide no authority for proposing changes to the ballot summary ordered by the Court. They cannot point vaguely to "amended findings" or "clarification" to seek *de facto* reconsideration of the Court's Order without stating any of the required grounds.

Defendants' position in their briefing before the Court was that Fair Share's challenge to the second summary was untimely and the second summary was true and impartial. Having lost that position, they cannot now advance a new position based on a new third ballot summary. The Alaska Supreme Court has made clear that "[a]n issue raised for the first time in a motion for reconsideration is not timely" and is deemed waived.[3] Defendant's new position would have been improper even in their reply briefing:

> The function of a reply memorandum is to respond to the opposition to the primary motion, not to raise new issues or arguments, much less change the nature of the primary motion. *E.g., Alaska State Employees Ass'n v. Alaska Public Employees Ass'n*, 813 P.2d 669, 671 n.6 (Alaska 1991) (argument raised for the first time in reply memorandum could not be considered); *Bittner v. State*, 627 P.2d 648, 649 (Alaska 1981) (summary judgment may not be upheld on the basis of a ground which was urged for the first time in the movant's reply memorandum).[4]

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[3] *Stephanie W. v. Maxwell V.*, 319 P.3d 219, 225-26 (Alaska 2014); *see also Stadnicky v. Southpark Terrace Homeowner's Ass'n*, 939 P.2d 403, 405 (Alaska 1997) (citing *Miller v. Miller*, 890 P.2d 574, 576 n. 2 (Alaska 1995) ("[T]he issue was improperly raised in the motion for reconsideration, since it had never previously been raised.")); *McCarter v. McCarter*, 303 P.3d 509, 513 (Alaska 2013) ("[Appellant] made this statutory argument for the first time in his motion for reconsideration, and it is therefore waived.")

[4] *Demmert v. Kootznoowoo, Inc.*, 960 P.2d 606, 611 (Alaska 1998).

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"In general, evidence which is necessary to prove a prima facie case should be presented in the plaintiff's case in chief. 6 J. Wigmore, Sec. 1873, at 678."[5] Defendants were required to fully present their case before the Court and allow Fair Share to fully respond, not wait until after the Court has ruled against them to advance an alternative position under the guise of amending non-existent findings or seeking clarification of an Order that is plain on its face, and further forcing Fair Share to respond in expedited fashion. Fair Share asks this Court to uphold the procedural rules and deny the Motion.

B. The Parties Agreed to an Expedited Process to Resolve This Matter for Timely Appeal to the Alaska Supreme Court.

As memorialized by this Court's calendaring order dated April 22, 2020, the parties and Court agreed to expedited concurrent briefing and oral argument within the month of May in order for this matter to be timely appealed as necessary. There was no contemplation of further rounds of briefing to accommodate further proposed changes by Defendants. Fair Share and this Court are not sounding boards for Defendants to continue brainstorming different ballot summaries until they are satisfied. A collaborative discussion could and should have taken place prior to Defendants forcing Fair Share to litigate this case. It is too late now to take another "do over." (Defendants made no mention of this third summary to Fair Share till the morning they filed it.) Given the path this matter has taken, Fair Share cannot believe Defendants would have accepted Fair Share proposing new language at this juncture had this

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[5] *Sirotiak v. H.C. Price*, 758 P.2d 1271, 1278 (Alaska 1988).

Court ruled the other way. Defendants should accept the outcome they drove the parties toward or at least should be foreclosed from evading it.

C. Defendants' Third Proposed Summary of the Fair Share Act Continues Their Distortion of the Plain Text and Clear Intent of Section 7.

Because Defendants seek to re-argue what this Court has already decided, Fair Share again restates its position: Section 1 of the Fair Share Act provides, "Notwithstanding Any Other Statutory Provisions to the Contrary, the Oil and Gas Production Tax in AS 43.55 Shall Be Amended as Follows[.]" In turn, Section 7 provides, "All filings and supporting information provided by each producer to the Department relating to the calculation and payment of the taxes set forth in Sections 3 and 4 shall be a matter of public record."

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Fair Share has cited all ten Alaska statutes containing "matter of public record" to show it plainly means the opposite of confidential.[6] Fair Share has also offered a variety of caselaw supporting this plain meaning of the phrase,[7] and pointed out the difference between "matter

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[6] *See* Fair Share's Reply at 7 n.17 (May 22, 2020) (AS 08.18.021(b) ("The information contained in the application shall be a matter of public record and open to public inspection."); AS 27.21.100(c)(1),(2) (information "must be kept confidential and not made a matter of public record"); AS 37.10.230(b) (disclosure "is a matter of public record and shall be included in the minutes of the board meeting next following the disclosure."); AS 37.13.110(b) (disclosure "is a matter of public record and shall be included in the minutes of the board meeting next following the disclosure."); AS 40.25.100(a) (information "that discloses the particulars of the business or affairs of a taxpayer or other person . . . is not a matter of public record [and] shall be kept confidential"); AS 44.25.028(b) (disclosure "is a matter of public record and shall be included in the minutes of the board meeting next following the disclosure."); AS 44.88.215(a) ("unless the records or information were a matter of public record before submittal to the authority, the following records and information shall be kept confidential"); AS 14.03.110(a) (questionnaire or survey impermissible if it "inquires into personal or private family affairs of the student not a matter of public record or subject to public observation"); AS 44.33.020(a)(36) (" data collected under this paragraph that discloses the particulars of an individual business is not a matter of public record and shall be kept confidential"); AS 38.05.810(c) ("Any information provided the state in the course of an audit becomes a matter of public record.")).

[7] Fair Share's Reply at 7 n.18. *See, e.g., Downie v. Superior Court*, 888 P.2d 1306, 1308 (Alaska App. 1995) ("[T]he date set for trial is a matter of public record and cannot conceivably be considered confidential.") (quoting *State v. Bilton,* 36 Or.App. 513, 585 P.2d 50, 52 (1978)); *William E. Schrambling Accountancy Corp. v. U.S.*, 937 F.2d 1485, 1487-90 (9th Cir. 1991) (granting judgment in favor of government's position that recording of liens "made the information a matter of public record to which no reasonable expectation of privacy could attach" and no longer confidential); *Rodgers v. Hyatt*, 697 F.2d 899, 902 (10th Cir. 1983) ("It is well established under the law dealing with actions for invasion of privacy that no reasonable expectation of privacy attaches to those matters that are a matter of public record.") (citing *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975); Restatement (Second) of Torts, Explanatory Notes, Section 652D, comment b, at 385 (1977) ("Thus there is no liability for giving publicity to facts about the plaintiff's life that are matters of public record")); *In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 19 (C.A.1 2003) ("matters of public record are fair game in adjudicating Rule 12(b)(6) motions, and a court's reference to such matters does not convert a motion to dismiss into a motion for summary judgment")

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of record" and "public record" in Black's Law Dictionary.[8] Defendants have offered no authority supporting their supposed confusion, but nonetheless persist in suggesting the common phrase is somehow surrounded in uncertainty. AS 40.25.100(a) provides "[i]nformation in the possession of the Department of Revenue that discloses the particulars of the business or affairs of a taxpayer or other person . . . is not *a matter of public record* . . . . The information *shall be kept confidential* except when its production is required in an official investigation, administrative adjudication . . . or court proceeding" (emphasis added). If a document is "a matter of public record," it is available to the public and not confidential. This

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(citation omitted); *Slade v. Schneider*, 129 P.3d 465, 471, 212 Ariz. 176, 182 (Ariz. App. Div. 1 2006) ("Though no published cases interpret when the Commission makes the names, information and documents a matter of public record, we need not determine all of the Commission's actions that would result in the names, information and documents no longer being confidential because we agree with the Commission that this occurs when the Commission files the information or documents with a public tribunal."); *Havens v. State of Ind.*, 793 F.2d 143, 145 (7th Cir. 1986) ("the information elicited during Milford's cross-examination was not confidential information because it was a matter of public record."); *Lopez v. Wal-Mart Stores, Inc.*, 2012 WL 929851, at *2 (N.D. Cal. 2012) ("Only after Lopez pointed out that the consent decree was public did Wal-Mart withdraw the designation. In other cases, too, Lopez has been able to locate Wal-Mart's policies in public record and again after pointing it out, caused Wal-Mart to withdraw its "confidential" designation of documents.").

[8] Fair Share's Reply at 6 n.16 ("RECORD, Black's Law Dictionary (11th ed. 2019) ("public record. (16c) A record that a governmental unit is required by law to keep, such as land deeds kept at a county courthouse. Public records are generally open to view by the public. *Cf. public document* under DOCUMENT (2).;" DOCUMENT, *Id.* ("- public document. (17c) A document issued or published by a political body or otherwise connected with public business. *Cf. public record* under record."); MATTER, *Id.* ("matter of record. (16c) A matter that has been entered on a judicial or other public record and can therefore be proved by producing that record.")).

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is the plain text and clear intent of the Fair Share Act, but Fair Share only asked this Court to let the phrase speak for itself, and this Court so ordered:

> The most impartial resolution of the meaning of Section 7 and the impact it would have on public access to the producers' filings is to say nothing about the Public Records Act. Let the public decide whether it favors what Vote Yes claims its initiative is intended to achieve. Vote Yes wants more transparency in the State's taxation regime as it applies to producers covered by the initiative. If the initiative passes, then the disputes about what the language of the initiative actually accomplishes can be litigated. *For now the most important goal is to allow Vote Yes to present its vision of taxation and transparency to the voters.* It may be that the initiative's language is not sufficiently precise to achieve all of the sponsors' intended results. But the voters *should be permitted to voice their opinions of the sponsors' intentions without Meyer opining that the initiative does not achieve to the level of transparency that the sponsors' seek through section 7.*[9]

Defendants' new "proposal" is contrary to this Court's decision. Rather than accept the Court's deletion and allow Fair Share to present its vision to the voters as stated in the Order, Defendants now offer a third interpretive attempt at undermining the Act's plain terms: "The act does not specify the process for disclosure of the public records and whether any exceptions may apply."[10] Section 7 states: "*All* filings and supporting information provided by each producer to the Department relating to the calculation and payment of the taxes set forth in Sections 3 and 4 *shall* be a *matter of public record"* (emphasis added). Defendants' improper proposal makes a mockery of the Act's use of the terms "all," "shall," and the phrase "be a matter of public record." It plainly opines the initiative does not achieve the level of transparency the sponsors seek. For whatever reason, Defendants insist on mentioning possible

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[9] Order at 17.
[10] Motion at 4.

exceptions to disclosure, which will obviously provide a foundation for future opposition to the Act. This Court has removed Defendants' finger from the scales of the ballot summary and should now keep it off, explicitly foreclosing further changes to ensure Defendants' compliance with its Order.

CONCLUSION

This Court has ruled and this case should end. Defendants desire reconsideration but cannot provide grounds for it, and so vaguely clothe their Motion in "amended findings" and "clarification." Procedurally and substantively, their Motion fails on its face. Substantively, Defendants yet again attempt to undermine the transparency of Section 7 with unsupported suggestions of uncertainty regarding process and exceptions. Fair Share looks once more to the Alaska Supreme Court's directive for the ballot summary to be "a fair, concise, true and impartial statement of the intent of the proposed measure,"[11] 'free from any misleading tendency, whether of amplification, of omission, or of fallacy, and . . . must contain no partisan coloring.'"[12] The "theory of initiative legislation [is] based upon the security that the legislation proposed and petitioned for by the people shall be voted upon at the polls by them without interference, revision, or mutilation by any official or set of officials[.]"[13] Fair Share

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[11] *Planned Parenthood,* 232 P.3d at 731 (quoting *Burgess v. Alaska Lieutenant Governor*, 654 P.2d 273, 275 (Alaska 1982)).

[12] *Planned Parenthood*, 232 P.3d at 731 (quoting *Pebble Ltd. P'ship ex. rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064, 1083 (Alaska 2009)).

[13] *McAlpine v. University of Alaska*, 762 P.2d 81, 93 (Alaska 1988) (quoting *Bennett v. Drullard*, 27 Cal.App. 180, 149 P. 368 (Cal. App. 1915)). The Court disagreed with *Bennett*

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respectfully urges this Court to end Defendants' continued interference and partisan coloring by firmly denying its improper Motion.

RESPECTFULLY SUBMITTED this 18th day of June, 2020.

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Certificate of Service
I hereby certify that on June 18, 2020, a true and correct copy of the foregoing document was served **by e-mail** upon the following:

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in holding "circumspect judicial exercise of the power to sever impermissible portions of initiatives will promote, rather than frustrate" the constitutional right and practical recourse of the sponsors. *Id.*

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

VOTE YES FOR ALASKA'S FAIR SHARE, Plaintiff, v. KEVIN MEYER, LIEUTENANT GOVERNOR OF THE STATE OF ALASKA, and STATE OF ALASKA, DIVISION OF ELECTIONS, Defendants.	Case No. 3AN-19-11106 CI

FILED in the TRIAL COURTS
STATE OF ALASKA, THIRD DISTRICT
JUN 22 2020
Clerk of the Trial Courts
By _____ Deputy

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REPLY IN SUPPORT OF MOTION TO MAKE ADDITIONAL FINDINGS AND AMEND ORDER PURSUANT TO CIVIL RULE 52(b); ALTERNATIVELY, MOTION FOR CLARIFICATION OF ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Plaintiff Vote Yes for Alaska's Fair Share's opposition demonstrates why clarification or amendment of the Court's findings is necessary. In opposition to the Lieutenant Governor's motion, Plaintiff claims that the Court's June 8, 2020 order means that "the summary on the ballot must truly and impartially reflect Fair Share's vision" of the proposed law. Opp. at 3. But that is not what the Court's order said, and with good reason. The law does not charge the Lieutenant Governor with presenting a summary reflecting *Plaintiff's* interpretation of an initiative; it charges him with providing a summary that fairly and impartially describes the bill. The Court determined in its decision that the ultimate meaning of the bill's language should be resolved post-enactment whether by the Department of Revenue or the courts in subsequent litigation.

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The Lieutenant Governor's proposed language is not an attempt to weigh in on the meaning of section 7. Instead, the Lieutenant Governor is stating in a "true and impartial" way that the initiative "does not specify the process for disclosure of the public records and whether any exceptions may apply." This is a neutral, factual statement that accurately describes the language of the initiative.

The meaning of section 7 has not been determined. The Court recognized this when it explicitly declined to resolve the issue: "The Court is not authorized to resolve [the] dispute over the meaning of section 7." Despite this clear statement, Plaintiff continues to argue that the summary should describe *its* interpretation of what the initiative will accomplish. If that were the case, there would be no need for a ballot summary, and the only information the voters would need would be the sponsor's statement that is included in the election pamphlet.[1] The election pamphlet on the initiative, however, will contain four statements: the sponsor's statement, an opposition statement, a statement by the Legislative Affairs Agency, and the ballot summary by the Lieutenant Governor.[2] Thus the sponsors will have the opportunity to share their "vision" of the bill, but the ballot summary has a fundamentally different role—to describe the bill's provisions in a neutral manner.

As the Court recognized in its order, Plaintiff's interpretation may prevail, but it

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1 *See* AS 15.58.020(a)(6)(E).

2 AS 15.58.020(a)(6)

also may not. Partisan suasion can occur on both sides of an initiative,[3] and regardless of whether the Lieutenant Governor's first attempt to summarize this dispute tipped too far towards one interpretation, the Lieutenant Governor still has the responsibility to "enable voters to reach informed and intelligent decisions on how to cast their ballots—free from any partisan suasion." Because the initiative bill fails to specifically address its interplay with existing law and the Alaska Constitution's right to privacy, it leaves a main feature of the bill lacking clarity and subject to significant swings in interpretation between those wanting more transparency and those seeking to protect their information. Ultimately, the Department of Revenue must implement the law. Without conceding that the initial summary was improper, the Lieutenant Governor is responding to the Court's order by proposing alternative language that does not weigh in on this debate while still neutrally summarizing the bill. This language properly advises the voters of what the initiative bill would do without leading them to one interpretation or the other.

In its order, the Court implied that it would have upheld the ballot summary had the language merely pointed out the lack of clarity in section 7: "[The Lieutenant Governor] does not reveal that there is a dispute over the meaning of 'a matter of public record.' He does not indicate that it is unclear whether the exceptions to disclosure of

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[3] See *Planned Parenthood of Alaska v. Campbell*, 232 P.3d 725, 730 (Alaska 2010) (Plaintiff in this case opposed the initiative, and Court held that petition summary did not disclose information that would give petition signers "serious grounds for reflection.").

public records, contained in AS 40.25.120, might apply to some of the producers' filings." The Lieutenant Governor's proposed language does this. The new sentence would state: "The act does not specify the process for disclosure of the public records and whether any exceptions may apply." Without this sentence, the summary indicates only that filings and other information are "a matter of public record," which strongly implies that they are unconditionally public information.

The Lieutenant Governor is simply seeking clarification that he has indeed read the Court's order correctly. Plaintiff implies that the Court's order foreclosed the Lieutenant Governor from making any changes other than to delete the sentence but this is simply not the case. The Court ordered only the removal of one sentence and the Lieutenant Governor seeks clarity given the reasoning in the order and the Lieutenant Governor's obligation to inform voters.

The Court has the authority to (1) clarify its order and make clear that the Lieutenant Governor may replace the deleted sentence with additional language that complies with the Court's order; and (2) consider the Lieutenant Governor's proposed revision. When the Alaska Supreme Court has concluded that a ballot summary violated statutory requirements, the court has either proposed revised language[4] or ordered the

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[4] *Alaskans for Efficient Gov't., Inc. v. State*, 52 P.3d 732, 737 (Alaska 2002) (proposing revised language so that the disputed sentence "would read: 'The bill would repeal the requirements that before the state can spend money to move the legislature, the voters must *be informed of* the total costs as *would be* determined by a commission, and approve a bond issue for all bondable costs of the move'").

Lieutenant Governor to change the summary to comply with the court's decision.[5] By reviewing and upholding the Lieutenant Governor's proposed revision to comply with the Court's order, the Court would be doing no more here than the Alaska Supreme Court has done in similar circumstances.

For these reasons, Defendants Lieutenant Governor Kevin Meyer and the Division of Elections respectfully request that the Court grant Defendants' motion and approve the revised ballot summary.

DATED June 22, 2020.

KEVIN G. CLARKSON
ATTORNEY GENERAL

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[5] *Planned Parenthood*, 232 P.3d at 734 ("Provided that the summary is corrected and provided that the PCA and the enforcement provisions implicated by the PNI are made available to the voters along with the PNI…"); *Alaskans for Efficient Gov't., Inc.*, 52 P.3d at 737 (reversing the superior court and remanding "to the lieutenant governor with directions to revise the summary as necessary to comply with this order").

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

VOTE YES FOR ALASKA'S FAIR SHARE, Plaintiff, v. KEVIN MEYER, LIEUTENANT GOVERNOR OF THE STATE OF ALASKA, and STATE OF ALASKA, DIVISION OF ELECTIONS, Defendants.	Case No. 3AN-19-11106 CI

~~[PROPOSED]~~ ORDER DENYING DEFENDANTS' MOTION TO MAKE ADDITIONAL FINDINGS AND AMEND ORDER OR ALTERNATIVELY FOR CLARIFICATION

THIS COURT having considered the Defendants' Motion to Make Additional Findings or for Clarification dated June 12, 2020 ("Motion"), the Plaintiff's opposition, and any reply thereto, and being fully advised,

IT IS HEREBY ORDERED that Defendants' Motion is DENIED.

DATED this 26 day of June, 2020

William F. Morse
Judge of the Superior Court

I certify that on 6.26.20 a copy of the following was mailed/emailed to each of the following at their addresses of record.

Administrative Assistant

Brena Mills

JUN 18 2020

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

VOTE YES FOR ALASKA'S FAIR SHARE, Plaintiff, v. KEVIN MEYER, LIEUTENANT GOVERNOR OF THE STATE OF ALASKA, and STATE OF ALASKA, DIVISION OF ELECTIONS, Defendants.	Case No. 3AN-19-11106 CI

I certify that on 7-1-20 a copy of the following was mailed/emailed to each of the following at their addresses of record.
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JUN 29 2020

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~~[PROPOSED]~~ FINAL JUDGMENT

Pursuant to the orders issued on June 8, 2020 and June 26, 2020, final judgment is hereby entered in favor of Plaintiff Vote Yes for Alaska's Fair Share and against Defendant Kevin Meyer, Lieutenant Governor, and the State of Alaska, Division of Elections as follows:

1. Defendants shall delete from the ballot summary the sentence "This would mean the normal Public Records Act process would apply."

2. Defendants shall pay Plaintiff's fees and costs in the amount of _____.

Plaintiff is the prevailing party in this action and may move for an award of attorney's fees and costs. This final judgment may be amended following the Court's ultimate resolution of any such motion.

Dated 1 July 2020

William F. Morse
Superior Court Judge